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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 18

UNITED STATES, *Petitioner*,

v.

THE WESTERN PACIFIC RAILROAD COMPANY, BANGOR AND AROOSTOOK RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, *Respondents*.

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

OPINION BELOW

The opinion of the Court of Claims in all three cases (R. 84-86) is reported at 132 C. Cls. 115 and 131 F. Supp. 919.

JURISDICTION

The judgment of the Court of Claims in the *Western Pacific* case (R. 85) was entered on June 7, 1955. On the same day, entry of judgments in the *Bangor and Aroostook* and *Seaboard Air Line* cases was suspended pending determination of the exact amounts due (R. 85). A motion for rehearing in all three cases was denied on October 4, 1955 (R. 87). Judgments in the *Bangor and Aroostook* and *Sea-*

board Air Line cases were entered on November 8, 1955 (R. 87-89). The petition for certiorari was filed on December 9, 1955, and granted on January 23, 1956. The jurisdiction of this Court rests on 28 U.S.C. § 1255(1).

STATUTES INVOLVED

The statutory provisions involved are set forth in the Appendix, *infra*, pp. 84-86.

QUESTIONS PRESENTED

1. Whether, where suit is brought in the Court of Claims to recover transportation charges, most of which were deducted by the General Accounting Office pursuant to 49 U.S.C. § 66, the reasonableness or appropriateness of which the United States has never questioned before the Interstate Commerce Commission, it is error for the Court of Claims to refuse to refer the suit to the Commission or to stay the suit pending action to enable the United States to institute a proceeding before the Commission, where it appears that, by reason of limitations, the Commission has lost jurisdiction to entertain such a proceeding.

2. Whether steel bomb bodies filled with incendiary gels, without bursters and fuzes, should be classified and rated as incendiary bombs, or (a) as combination articles consisting of bomb bodies, gasoline, and soap powder or other chemicals, or (b), alternatively, as analogous to dummy bombs, empty bombs, or other articles of the 5th class.

3. Whether a carrier can be estopped from recovering undercharges from a shipper where the original quotation of a lower rate by the Official Classification Committee was rescinded, where there is a complete absence of proof of reliance by the shipper on such lower rate, and where indeed the shipper first paid the bills at the higher rate.

STATEMENT

In 1944, 1948, and 1950, the three respondent railroads severally shipped, for the United States, over 200 shipments of incendiary bombs, filled with Napalm gel, but without bursters and fuzes, and billed the United States therefor "incendiary bombs" under Item 1820 of the Consolidated Freight Classification No. 17 (R. 1-6, 23-41, 43-51, 56-63).

After the bills of respondents *Bangor and Aroostook* and *Seaboard Air Line* were paid, the General Accounting Office, acting pursuant to Section 322 of the Transportation Act of 1940 (49 U.S.C. § 66; *infra*, p. 85), made deductions against these respondents' subsequent bills, on the footing that the articles in question were combination articles under Rule 18 of the same classification, consisting of bomb bodies, gasoline, and soap powder or other chemicals, and so entitled to shipment at lower rates (R. 44-50, 63-68). The bills of respondent *Western Pacific* were originally paid at the lower rate (R. 1, ¶ 3; R. 5-6).

All three respondents then brought the present suits in the Court of Claims, seeking to recover undercharges, i.e., the difference between the bills as rendered and the bills as paid in the *Western Pacific* case (R. 1-2A), and the amount of the deductions in the other two cases (R. 23-42, 54-61). It is admitted that the *Western Pacific* suit was brought within six years of the time that the transportation services were rendered (R. 3, 5, Item 4), and that the other two were brought within six years of the time that the deductions were made (R. 43, 44, Item 4; R. 56-63, Item 4).[1]

[1] The Government here correctly states (U.S. Br. 13, n. 7) that "The record is silent * * * as to the dates when the Government, which originally paid Bangor and Seaboard the higher rate, undertook to recoup by deductions from amounts due for later transportation service." But since, as indicated, it was admitted that the deductions were made within six years of the time that suit was filed, the exact date is of course immaterial.

In the *Western Pacific* case, it was agreed by the parties that the shipments there involved were of "articles described as incendiary bombs without fuzes and bursters, being like the articles transported in the *Union Pacific* case No. 49505, previously decided by this Court on April 7, 1953" (R. 5). Similar admissions were made in the *Bangor and Aroostook* and the *Seaboard Air Line* cases (R. 43, 44, Item 3; R. 56, 63, Item 3).

In the *Union Pacific* case *(Union Pacific R. Co.* v. *United States,* 125 C. Cls. 390, final judgment entered, 126 C. Cls. 947), the Court of Claims had made findings of fact as follows (125 C. Cls. at 395-396, 400-401, 402-404):

"3. (a) The above articles described by the symbols M76 (PT1) were steel bomb bodies of the type described in War Department Technical Manual TM 9-1980—'Bombs for Aircraft'—as follows:

> "BOMB, incendiary, 500-lb., AN-M76, consists of the body for the 500-lb., G. P. bomb modified for field assembly of burster and igniter, and loaded with a gasoline gel-magnesium mixture. As released the bomb weighs 475 pounds, including 180 pounds of incendiary mixture.

"The steel bomb bodies were filled with PT1 gel, which is commonly called 'Goop' and is described in War Department Field Manual FM 3-6—'Employment of Air Chemical Munitions'—as follows:

Symbol	Name	Description and Physiological Effects
PT1	Incendiary Mixture PT1	Grayish-black solid consisting of IM, scrap magnesium, oxidizing agent, petroleum distillates, and gasoline. Difficult to extinguish. Burns fiercely and relatively fast. Rate of burning is dependent upon amount of oxidizing agent.
IM	Incendiary	Gel of isobutyl methacrylate polymer in gasoline. Burns evenly and is rather easy to extinguish if attacked soon enough.

"(b) The above article described by the symbols M47 A2 (NP) were steel bomb bodies of the type described in War

Department Technical Manual TM 9-1980—'Bombs for Aircraft'—as follows:

> BOMB, incendiary, 100-lb., AN-M47A2, is loaded with a 40-pound charge of gelled gasoline IM or NP. The complete round weighs 69 pounds.

"Such steel bomb bodies were filled with NP gel, which is described in War Department Field Manual FM 3-6—'Employment of Air Chemical Munitions'—as follows:

Symbol	Name	Description and Physiological Effects.
NP	Incendiary Oil NP	Gel of Napalm in gasoline. Napalm is mixture of metallic soaps. Properties similar to IM.

"(c) All the above articles described by the symbols M76 and M47 A2, consisting of bomb bodies of the types specified, filled with PT1 or NP gel as stated, were packed and shipped without the fuzes, bursters or other mechanisms used to open the bomb bodies and scatter and ignite the contents.

* * * * * *

"8. The Chemical Corps (formerly the Chemical Warfare Service) of the Department of the Army has produced and is producing bombs to disseminate three basic types of agents: incendiaries, smokes, and toxics. There are many types of bombs within the three classifications, depending upon the specific application. Incendiary bombs are primarily of the anti-matériel type. They are designed to set fire to inflammable structures such as dwellings and industrial installations.

"9. A completed incendiary bomb, capable of functioning as such in the field, consists of a bomb body or shell filled with inflammable material, such as the PT1 or NP gel, and equipped with a burster and fuze to open the bomb body and scatter and ignite the inflammable material. The burster is a steel tube inserted in the nose of the bomb and extending through its center. The burster contains a

small central well in which there is inserted a ¼-inch column of pelleted tetrol or TNT. The burster tube also contains a column of white phosphorus, which is poured in as a liquid and allowed to solidify. The function of the explosive is to open the bomb case and scatter the contents. The white phosphorous ignites in the air when blasted out by the explosive charge and is the element which ignites the gel. The fuze is a device in the nose of the bomb which, on impact, sets off a primer cap with a small explosion sufficient to fire the burster. The burster and fuze are inserted after the bomb body is filled with gel. The insertion of the burster and fuze is a simple mechanical operation which can be done by an enlisted man in the field and consists merely of screwing in the bursting tube and snapping in the fuze.

"10. Although the PT1, NP, and IM gasoline-thickened gels are highly inflammable, they are not self-igniting. A bomb body filled with the gel, but without the burster and fuze would not function as an incendiary bomb. If a bomb body filled with either the PT1 or NP gel were dropped from an aeroplane, the following results would occur; the M47, which has a thin case, would shatter, and the contents would be scattered over a small area; the M76, which has a much heavier case, would probably not be ruptured if it fell on soft ground. Ignition would not result from the impact, and there would be no change in the chemical composition of the contents of either bomb.

* * * * * *

"12. The Bureau of Explosives is an agency of the railroads which enforces regulations of the Interstate Commerce Commission governing the transportation of explosives and other dangerous articles. As part of its duties, the Bureau publishes such regulations in the form of a tariff, which does not purport to classify any articles or commodities for the purpose of assessing charges for their transportation, but merely sets forth the rules which have been approved by the Interstate Commerce Commission for

the packing, marking, loading, and handling of certain explosives and other dangerous articles. The regulations in effect in 1945 were published as Agent W. S. Topping's Freight Tariff No. 4, which in Section 59 provided as follows:

59 AMMUNITION, CHEMICAL, EXPLOSIVE

(a) Chemical ammunition used in warfare is all kinds of explosive chemical projectiles, shells, bombs, grenades, etc., loaded with toxic, tear, or other gas, smoke, or incendiary agents; also such miscellaneous apparatus as cloud-gas cylinders, smoke generators, etc., that may be utilized to project chemicals.

(b) When these articles are shipped assembled with their ignition elements, bursting charges, detonating fuzes, or explosive components they must be shipped in conformity with the regulations prescribed for explosive articles, class A, see sec. 57. For shipment of these articles not containing ignition elements, burstcharges, detonating fuzes, or other explosive components, see secs. 330, 342, and 364.

* * * *

"Section 330 of the tariff, referred to in the above-quoted paragraph, related to the shipment of bombs and shells containing poisonous gases or liquids but not equipped with ignition elements, bursting charges, detonating fuzes, or explosive components. Section 364, also refered to in the foregoing paragraph, related to the shipment of tear gases. Section 342 of the tariff pertained to the transportation of less dangerous poisons, which were defined in Section 336 as follows:

LESS DANGEROUS POISONS—CLASS B—LIQUID-POISON LABEL

(a) Poisonous liquids (including pastes and semisolids) are substances of such nature that they are chiefly dangerous by external contact with the body or by their being taken internally as in contaminated food or feeds.

(b) The vapors of some of this class of materials are also offensive or dangerous, but to a much less extent than class A poisons.

"Section 342 read as follows:

PACKING

(a) Chemical ammunition consisting of projectiles, shells, bombs, grenades, and other containers filled with gases, liquids, or chemicals, class B, without ignition elements, bursting charges, detonating fuzes, or other explosive components, must be packed for shipment in strong outside wooden or metal boxes. Boxes must be marked with name of contents and labeled as prescribed by these regulations for gases, liquids, or chemicals contained therein.

(b) Chemical ammunition, when shipped as such, must not be equipped or packed with explosive or ignition elements. (See Secs. 55 and 57 for explosive chemical ammunition.)

"Although a number of the bills of lading for the shipments involved here were stamped with the words 'Dangerous' or 'Explosives' (finding 11), there was no provision in Agent Topping's Freight Tariff No. 4 which required such notations on the bills of lading, nor did the tariff require that the articles be packed or marked as dangerous explosives.

"13. During the time of the shipments referred to herein, the War Department had in effect a supply bulletin, No. SB 55-6, which was described as a Freight Billing Guide for the application of the Consolidated Freight Classification to Chemical Warfare Service items. The first page of the bulletin contained the following statement:

This freight billing guide was compiled for the use of Transportation officers and their organizations. The bill of lading descriptions shown herein are to be used

in preparing and issuing bills of lading in accordance with paragraph 14*o* (2), AR 55-150, in order to facilitate settlement of transportation charges.

"The bulletin listed bombs of the M76 and M47 types under the heading 'Bomb, Incendiary' and included a direction that such bombs should be described on bills of lading as 'incendiary bombs' with reference to Consolidated Freight Classification No. 16, Item 1820.

"14. The gel with which the M76 and M47 bombs were filled is a very viscous material. The only opening in the bomb bodies is a small hole in the nose, and it would be extremely difficult to remove the gel from the bomb. The gels used in these and other types of bombs are not interchangeable, a special kind of gel being used for each type of bomb, and the bomb bodies themselves are not interchangeable. On one occasion, the Army attempted to recover the gasoline from the gels contained in a quantity of recaptured incendiary bombs. The attempt was not successful, and no process or method has since been developed for separating the gels into gasoline and the original thickening agents. The M47 and M76 bomb bodies when filled with gels, but without the bursters and fuzes, have no purpose or use except as incendiary bombs."

After making the foregoing findings, the Court of Claims in the *Union Pacific* case held (125 C. Cls. at 393, 111 F. Supp. at 268):

"We are of the opinion that when a steel bomb body, such as the M76 or M47 A2, is filled with an incendiary gel, such as PT1 or NP, it is an incendiary bomb, regardless of whether it contains a burster and fuze. While the absence of the burster and fuze admittedly renders the shipment of the article less hazardous from a transportation standpoint, the only logical description of such an article is as an incendiary bomb. The articles as described on the bills of lading were incendiary bombs without bursters and fuzes, and they had no purpose or use except as incendiary bombs."

The United States did not seek certiorari in the *Union Pacific* case, but, on the basis of the decision therein, stipulated judgment in *Southern Pacific Company* v. *United States,* 128 C. Cls. 773.

Accordingly, respondents moved for judgment on the pleadings or for summary judgment in all three of the present cases, on the footing that, in view of the *Union Pacific* case, there remained no question of law or fact to be tried (R. 6-7, 52-53, 70-71).

The United States opposed the motions on three grounds, as follows:

(a) It filed numerous affidavits, principally by government employees, as to the nature and characteristics of the articles now in question (R. 8-22, 72-83), the substance of the affidavits being that the *Union Pacific* decision was wrong.[2]

(b) The Government asked the Court of Claims either to refer the cases to the Interstate Commerce Commission for a determination of the reasonableness of the incendiary bomb rate, Item 1820, as applied to the incendiary bombs without bursters or fuzes here in question, or, in the alternative, that the cases be stayed to permit the Government to litigate the issue of reasonableness before the Commission.[3]

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[2] The statements in the Government's brief (U. S. Br. 5-7, 28-32) as to the characteristics of the shipments in issue are drawn exclusively from these *ex parte* affidavits. We show below in the course of the argument, pp. 51-58, *infra*, that none of the Government's affidavits raises any question of fact, as distinguished from questions of opinion and interpretation.

[3] Such request appears, not in the printed record here, but only at p. 38 of the brief filed by the Government below in opposition to plaintiff's motion for judgment on the pleadings or for summary judgment in the *Western Pacific* case, No. 42-54 in the Court of Claims. It is of course plain that a brief is no part of a record, whether the judgment reviewed is that of a federal (*Maryland Casualty Co.* v. *Jones,* 279 U. S. 792, 796) or of a state court (*Lynch* v. *United States,* 293 U. S. 52, 54; *Live Oak Assn.* v. *Railroad Comm.*, 269 U. S. 354). But since the Court of Claims dealt with the request on its merits, we do so here.

(c) The Government contended that *Bangor and Aroostook* and *Seaboard Air Line* were estopped to establish the applicability of Item 1820 for the shipments now in question, on the ground that, for a short time in 1943 and thereafter, the Official Classification Committee, an agency of all the railroads, informally ruled that these articles should be rated by analogy as empty aerial bombs under Item 1895 (R. 80-82). That ruling was subsequently rescinded and admitted to be a mistake by the Committee (R. 85). The record contains no evidence showing reliance by the Government on the ruling of the Official Classification Committee. It is conceded that both respondents concerned billed the Government at the higher, Item 1820, rate, and were paid at that rate, after which deductions were made (R. 85; U. S. Br. 7, n. 3), nor is it disputed that the Government continued to make shipments at the higher rate (R. 85; U. S. Br. 7, n. 3).

The Court of Claims granted respondents' motions for summary judgment (R. 84-85). It held, as to the basic issue (R. 84):

> "These cases present the same questions which the court considered and answered in the case of *Union Pacific Railroad Company* v. *United States*, 125 C. Cls. 390. A reconsideration of the question of classification of the articles as 'bombs or mines' under item 1820 of Consolidated Freight Classification No. 16, leads us to the same conclusion. The facts are the same and no purpose would be served by reciting again the historical facts in our former opinion and the facts in the instant case."

With respect to the request for suspension of the cases pending reference to the Interstate Commerce Commission for a determination of the reasonableness of the rates, the Court of Claims held that the Government's rights were barred by limitations (R. 84-85).

And the Court of Claims held that there was no estoppel against the *Bangor and Aroostook* or the *Seaboard Air*

Line, because the Government was neither misled nor injured; nor any acquiescence, because the railroads billed and were paid the higher rate and brought timely suit after the deductions were made (R. 85).

Two judges dissented (R. 86), saying that the Government should be allowed to "prove, if it can, that the objects in question are not incendiary and that to name them incendiary bombs for the purpose of these tariffs is to misname them." There was no suggestion by the dissenting judges that the Government's request for a reference to the Interstate Commerce Commission should or could have been granted, or that the respondents *Bangor and Aroostook* or *Seaboard Air Line* were estopped.

After denial of motions for new trial below (R. 87), this Court granted certiorari (R. 98).

SUMMARY OF ARGUMENT

I. This case presents primarily an effort by the Government, which already has three advantages over the orginary shipper, to obtain still a fourth advantage.

Shippers' complaints as to rates and charges fall into two classes, those alleging unreasonableness, which are cognizable only by the Interstate Commerce Commission, and those alleging overcharges. The latter are subject to a two year statute of limitations generally, except in the Court of Claims, where the period is six years; and except when the Government as shipper brings suit, in which event the United States is not bound by any limitations. Nor is the Government bound by limitations when it sets off alleged overcharges by way of counter-claim. And the Government has a third advantage, its right of unilateral administrative set-off by the Comptroller General under 49 U. S. C. § 66.

The correctness of such set-offs made in this case was contested here, and now, the Court of Claims having held

them to be not justified, the Government seeks belated resort to the Commission, alleging the unreasonableness of the rate, which no court can adjudicate. In asking that it be permitted to avail itself of a remedy it advisedly eschewed, it is now asking for a fourth preference over private shippers. Moreover, since the period of limitations before the Commission has been held to be jurisdictional, limiting the power of the Commission, it is asking for relief that the Commission cannot grant. There is therefore no question of interplay between courts and commissions, because, as will be shown, this Court has never yet directed reference of administrative questions to a commission when no rights could be saved thereby.

The Government had ample opportunity here to test the reasonableness of the challenged rate in an orderly proceeding, timely brought, which would have invoked the expertise of the Interstate Commerce Commission. It chose instead to rely on the fiat of the General Accounting Office. Having failed to establish the correctness of the Comptroller General's notions of transportation rates, it cannot now ask this Court to invent a remedy not available to other shippers, *viz.*, a belated appeal to the administrative body earlier ignored, particularly when that body now lacks power to afford relief.

II. A. Under an unbroken line of decisions in this Court, which have never evoked even a dissenting vote, the Commission is without power to entertain a complaint alleging unreasonableness of a rate after the two year statute of limitations has run. The lapse of the statutory period not only bars the remedy but destroys the liability; it is a limit set to the power of the commission; it is jurisdictional. *E.g., Louisville Cement Co.* v. *Interstate Com. Comm.*, 246 U. S. 638; *Louisville & N. R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, 227; *Midstate R. Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356.

B. The Interstate Commerce Commission has accordingly ruled that, on the basis of the decisions here—which followed earlier views of the Commission itself—it has no power to entertain an untimely complaint even when brought by the Government. This necesarily follows from the cases in this Court, which hold that the period of limitations goes, not to the standing of the litigant, but to the power of the Commission.

C. Since the limitations provision is jurisdictional, it is equally applicable to a judicial reference as distinguished from an independent proceeding. Accordingly, no such reference will be made after the statutory period has expired. *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304, 314-315. This controlling decision, which is not even cited by the Government here, is likewise ignored by the lower court cases relied on by the Government that are in conflict with the holding below on this point.

D. Just as the United States is not bound by limitations when it sues or counterclaims for overcharges, so the carriers, it has been held for thirty years, may sue for undercharges in the Court of Claims within the general six year limitation applicable there. This Court has twice refused to review the latter line of rulings. Their correctness was not challenged below in this case, nor presented in the Government's petition for certiorari here. That question is therefore not open now, and the Government's belated attempt to raise it at this junction is contrary to the Rules and the settled practice here. And whether a two or a six year limitation is applicable to a particular class of suits in the Court of Claims is hardly "jurisdictional" within the rule that new questions cannot be raised in briefs on the merits.

E. There is no unfairness in the result; the Government is not put to any disadvantage *vis-à-vis* other shippers; they too would lose a defense based on unreasonableness if they applied too late to the Commission. Since the Gov-

ernment chose to invoke the views of the General Accounting Office as to transportation rates in preference to the expert judgment of the Interstate Commerce Commission, it cannot now ask this Court to do what by orderly procedure it could have done for itself. *United States* v. *Munsingwear*, 340 U. S. 36, 40, 41.

III. A. This Court has consistently refused to direct a reference to an administrative agency when such reference would save no rights. Normally, of course, the rule is that, where a suit involves questions of reasonableness arising under the Interstate Commerce Act—which of course are subject to the exclusive jurisdiction of the Interstate Commerce Commission—the court must stay its hand until the Commission has passed on those questions. But such a reference will not be ordered when the administrative agency has lost power to act by reason of limitations (*Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304), or where the Commission has already determined the issues (*Crancer* v. *Lowden*, 315 U. S. 631), or where the agency concerned never had power to act (*Montana-Dakota Co.* v. *Public Serv. Co.*, 341 U. S. 246).

B. Nothing in the Administrative Procedure Act enlarges the power of the Interstate Commerce Commission to make determinations as to reasonableness after the period of limitations has expired. Section 5(d) of that measure, authorizing the issuance of declaratory orders "with like effect as in the case of other orders," plainly does not enlarge jurisdiction. The declaratory judgment remedy, as this Court has held, is procedural only and does not affect jurisdictional requirements. Therefore, since the Commission here lost power to act after expiration of the period of limitations, the extension to it of the declaratory order power did not help, as the legislative history of the Administrative Procedure Act shows. The sole report of a Division of the Commission to the contrary disregards not only that history but controlling decisions of this Court as well.

C. Assuming *arguendo* only that a reference could be made, examination of *War Materials Reparation Cases,* 294 I. C. C. 4, reconsideration denied, 297 I. C. C. 635, shows that the rates in force were entirely reasonable, and that accordingly any relief for the Government would in any event be extremely doubtful.

IV. A. The issue of the propriety of summary judgment below, which was not presented in the Government's petition for certiorari, is not open now under the settled practice of this Court.

B. The substantive question here is solely one of classification under published tariffs, which the Court of Claims had jurisdiction to determine, and under which issues of reasonableness and unreasonableness were not open to either party.

C. The Government admitted that the articles in question here were the same as those involved in the earlier incendiary bomb case, *Union Pacific R. Co.* v. *United States,* 125 C. Cls. 390. Comparison of the Court of Claims' findings of fact there with the affidavits adduced by the Government in opposition to respondents' motions for summary judgment here establishes that those affidavits contain no single new fact that is legally relevant, but involve simply questions of opinion and interpretation.

D. Application of well-settled rules of rate classification requires the holding that incendiary bombs less bursters and fuzes are properly rated as incendiary bombs, since the absence of essential parts not affecting the identity of an article offered for transportation does not destroy its fundamental charter from a tariff standpoint.

The rule of rating combination articles, relied on by the General Accounting Office in making the deductions here in issue, does not, it has been repeatedly held, apply to articles that have the characteristic of an entity—as these do, because the incendiary gel cannot except with great

difficulty be removed from the bomb body once it is put inside, nor can the gel be separated into its original components at all.

The rule of analogy does not apply either, but, if applicable, would support the ruling below, since the articles shipped are more nearly described as incendiary bombs than as dummy bombs or empty bombs.

The applicability or otherwise of the regulations for explosives and other dangerous articles has no bearing whatever on the classification of these or any other articles for rate purposes. *United States* v. *Gulf Ref. Co.*, 268 U. S. 342, 350. And the mere fact that incendiary bombs without bursters and fuzes are less hazardous is not controlling, since, even when the reasonableness of a rate is properly under consideration, hazard is simply one factor out of many that must be taken into account in determining whether particular rates are just and reasonable. Moreover, in its attempt to minimize the essentially deadly character of the articles now in question, the Government makes several misleading references that improperly equate Napalm gel, the fearsome jellied gasoline, with Napalm less the gasoline, which is only the inert granulated soap that serves as the thickening agent.

V. Respondents *Bangor and Aroostook* and *Seaboard Air Line* are not estopped, since the Government can show neither reliance, change of position, nor prejudice. The record shows no reliance on the admittedly mistaken ruling of the Official Classification Committee, soon rescinded, that the articles here in question were rateable by analogy as empty bombs. Any suggestion that the Government relied on that ruling to ship by rail rather than by truck is at least purely speculative and in large measure even imaginary. Indeed, insofar as the record shows any reliance by the Government in these cases, in any aspect, it shows that the Government relied on the bills at the higher rate which these two respondents presented, inasmuch as it originally

paid those bills at that rate. And since, once deductions were thereafter made, respondents sued within the period of limitations, there was no acquiescence on their part which bars them now. *St. Louis B. & M. Ry.* v. *United States,* 268 U. S. 169, 174-175.

ARGUMENT

Apart from two additional points first raised in the Government's brief on the merits pursuant to the disapproved "practice of smuggling additional questions into a case after we grant certiorari" (Jackson, J., in *Irvine* v. *California,* 347 U. S. 128, 129), this case presents primarily an effort by the Government, which already has three advantages over the ordinary shipper, to obtain another advantage heretofore denied all shippers.

Once the statutory scheme that provides remedies for shippers who deem themselves aggrieved by a carrier's transportation charges or practices is examined, it becomes plain that the case now under consideration involves no question whatever of the interrelationship of courts and commissions, and that it does not concern in the slightest "the precept that courts and administrative agencies are designed to serve as 'collaborative instrumentalities of justice'" (U. S. Br. 23).

On the contrary, the present litigation constitutes an instance of an attempt by the Government, after its use of administrative fiat as a unitary instrumentality of arbitrariness has been judicially condemned, to obtain another remedy which it did not earlier choose to use when it was available, and which is now beyond the power of the administrative agency concerned to grant.

We therefore turn, at the outset, to an examination of the comprehensive remedial machinery that Congress has provided for shippers who complain of carriers.

I. THIS CASE PRESENTS NO QUESTION OF INTERRELATIONSHIPS BETWEEN COURTS AND COMMISSIONS, BUT ONLY AN ATTEMPT BY THE GOVERNMENT TO OBTAIN AN ADDITIONAL ADVANTAGE OVER PRIVATE SHIPPERS.

It is fundamental in transportation law that a shipper's complaints as to rates and charges by carriers fall into two classes—those involving the alleged unreasonableness of rates or practices, and those involving overcharges, which latter are defined by Section 16(3)(g) of the Interstate Commerce Act (*infra* p. 85) as "charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission."

Complaints setting forth unreasonableness are, of course, cognizable only by the Commission, under a long line of cases beginning with *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. That rule was applied by the court below in the *Union Pacific* incendiary bomb case, 125 C. Cls. at 394, and, by plain implication, in this case as well. Indeed, far from being questioned here, it is the starting point for both parties' positions in the present litigation.

Complaints by shippers claiming overcharges stand on a different footing:

The ordinary shipper, having a claim against a carrier for overcharges, has a two year period to sue following delivery of the shipment, subject to an exception not here material, and has the option of bringing suit or filing a complaint with the Commission. Section 16(3)(e) of the Interstate Commerce Act, *infra* p. 85.

The Government, it has been held, is not bound by this two year period if it goes to court.[1] *DuPont de Nemours & Co.* v. *Davis*, 264 U. S. 456, 462; *Shutt* v. *United States*, 218 F. 2d 10 (C. A. 5). This follows from the general proposition that the United States, as sovereign, is not

[1] For the duty to elect, see Section 9 of the Act (49 U. S. C. § 9) and *United States* v. *Interstate Commerce Commission*, 337 U. S. 426.

bound by statutes of limitations, *e.g., United States* v. *Summerlin,* 310 U. S. 414, except of course where it is specifically named in the statute. *United States* v. *Lindsay,* 346 U. S. 568. This freedom from limitations, very plainly, gives the Government its first advantage over private shippers.

The Government has a second advantage over the ordinary shipper. When it is sued by a carrier for an undercharge, the United States may counterclaim for overcharges, regardless of limitations, and it has in fact availed itself of this right. *Atlantic Coast Line Railroad Co.* v. *United States,* 140 F. Supp. 569 (C. Cls., May 1, 1956).

Finally, the Government has a third advantage over private shippers, one which seems to be almost invariably used; that is the unilateral set-off permitted the United States by Section 322 of the Transportation Act of 1940 (49 U. S. C. § 66, *infra* p. 85), pursuant to which the Comptroller General simply deducts from a carrier's subsequent bills any overcharges which he determines to have been present in prior bills already paid. That remedy was availed of in the *Union Pacific* incendiary bomb case, 125 C. Cls. at 391-392, 398-399 (Fdg. 5), and against the *Bangor and Aroostook* and *Seaboard Air Line* in this case (U. S. Br. 7).

While, of course, the respondent carriers last named were plaintiffs below, still, since they brought the present actions to recover the deductions made, it is the United States that is in the position of a plaintiff in respect of such deductions, and accordingly the burden of proof here is on the United States. *United States* v. *New York, N. H. & H. R. R. Co.,* ..... F. 2d ..... (C. A. 1, No. 5090, decided August 10, 1956); *Atlantic Coast Line Railroad Co.* v. *United States,* 140 F. Supp. 569, 572 (C. Cls.); *Atchison, Topeka and Santa Fe R. Co.* v. *United States,* 118 C. Cls. 194, 200; *Missouri Pacific R. Co.* v. *United States,* 57 C. Cls. 431, 446.

The Government now seeks a fourth advantage over other shippers, namely, a longer period for resort to the Commission now that the grounds of its unilateral administrative set-off have once again been judicially condemned.

As we point out below in more detail, pp. 23-30 *infra*, the two year limitation for resort to the Commission for a determination of the reasonableness of the rate, Section 16(3)(b) of the Act (*infra* p. 84), has been uniformly construed, by the Commission as well as by this Court, to be jurisdictional in the sense of terminating the Commission's power in the premises. Therefore, in now asking that the present case be referred to the Commission for a determination as to reasonableness of the challenged rate, long after the Commission has lost power to consider that issue, the Government is not only asking that it be permitted at this time to avail itself of a remedy which earlier it advisedly eschewed, and that it be given a fourth preference over non-Government shippers, it is also asking for relief that is not within the Commission's power to grant.

There is therefore no question here of interplay between courts and commissions. As we show below, pp. 39-42, this Court has never yet directed reference of administrative questions to a commission when no rights could be saved thereby. It follows in consequence that what is presented is the bald proposition that, when the Government has studiously avoided timely resort to the Commission for a determination of reasonableness, and has attempted but failed to collect alleged overcharges by means of the Comptroller General's power of set-off, it may change its position at that juncture, and then seek belated access to the Commission.

It is argued at length (U. S. Br. 15, *et seq.*) that it is unfair to permit the carrier six years to sue the United States in the Court of Claims and yet hold the United States to a two year period before the Commission for a determination as to reasonableness. But this argument

blurs the vital distinction between overcharges and other damages.

Issues of reasonableness are only for the Commission. When a carrier sues for undercharges, or a shipper for overcharges, questions of reasonableness are, plainly enough, not open for judicial determination. In such suits for overcharges or undercharges, the period of limitations is two years for both sides, Sections 16(3)(a), 16(3)(c), *infra* p. 84, except when the Government sues or counterclaims as a shipper, in which event there are no limitations (*supra* pp. 19-20), and except where a carrier sues the Government in the Court of Claims, when the general six year statute applies. *Southern Pacific Co.* v. *United States,* 62 C. Cls. 391; *Seaboard Air Line R. Co.* v. *United States,* 113 C. Cls. 437, certiorari denied, 338 U. S. 848; *Union Pacific R. Co.* v. *United States,* 114 C. Cls. 714, certiorari denied, 339 U. S. 930.

If the cited rulings are deemed "unfair" (U. S. Br. 18, 22) by Congress, in that they give carriers an advantage in respect of Government shipments, or if the rule that the United States is not bound by limitations is similarly "unfair" in giving the Government an advantage over other shippers in respect of suits or counterclaims for overcharges, the remedy is for Congress. The circumstance that the rulings last cited have been acquiesced in for a generation, and that this Court has twice declined to review them, should be persuasive evidence that, if they are now to be changed, only the Congress should do so.[2]

The Government had ample opportunity here to test the reasonableness of the challenged rate in an orderly proceeding, timely brought, which would have invoked the

[2] We point out below, pp. 33-37, that the Government's present contention that the rulings in question are wrong and that the Court of Claims had no jurisdiction to entertain the present case at all (U. S. Br. 13-14, 43-58) was not raised in its Petition for Certiorari and is accordingly not open at the present juncture.

transportation expertise and informed judgment of the Interstate Commerce Commission. It chose instead to rely on the fiat of the General Accounting Office. Having failed in contested proceedings to establish the correctness of the Comptroller General's notions of railroad rate classification, it cannot ask this Court to invent, without statutory sanction, a remedy that is plainly unavailable to other shippers, *viz.*, a belated appeal to the administrative body that the Government earlier ignored. Here, as in *United States* v. *Munsingwear*, 340 U. S. 36, 40, the United States "did not avail itself of the remedy it had to preserve its rights." It therefore has no just cause for complaint now.

Just as the acts of a traitor broadcasting enemy propaganda "cannot be blown up into a great issue of civil liberties" (*Chandler* v. *United States*, 171 F. 2d 921, 939 (C. A. 1), certiorari denied, 336 U. S. 918), so the Government's belated preference for commission determination after its arbitrary set-off has failed, and after the power of the commission concerned to make a determination has ceased, cannot be inflated and distorted into any question of the proper interrelationship of courts and commissions as collaborative instrumentalities of justice.

II. THE TWO YEAR LIMITATION FOR CHALLENGING THE REASONABLENESS OF A RATE BEFORE THE INTERSTATE COMMERCE COMMISSION IS JURISDICTIONAL AND LIMITS THE COMMISSION'S POWER.

A. Under an unbroken line of decisions here, the Commission is without power to act after the expiration of the two year period.

The heart of the present case is the nature of the limitations provision for challenging the reasonableness of a rate before the Interstate Commerce Commission. The Government, which cites only a few of the decisions here, and carefully refrains from ever setting out the *ratio decidendi* of even those few, concludes that the provision does not bar the United States from obtaining a determination as to the reasonableness of a rate after expiration of the period of limitations (U. S. Br. 15-27). But, once all of the authori-

ties are examined, once the reasoning of this Court's decisions on the point is looked to, it becomes plain that the period of limitation contained in Section 16(3) of the Interstate Commerce (*infra*, p. 84), is, under a long and consistent line of rulings here, jurisdictional, in the sense that it deprives the Interstate Commerce Commission of power to entertain such a complaint thereafter. *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662; *Louisville Cement Co.* v. *Interstate Com. Comm.*, 246 U. S. 638; *Kansas City So. Ry.* v. *Wolf*, 261 U. S. 133; *William Danzer Co.* v. *Gulf R. R.*, 268 U. S. 633; *Louisville & N. R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217; *Midstate Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356.[3]

The rule was first announced in *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, *supra*, a case involving overcharges. There the plaintiff in error, a shipper, sued to recover overcharges based on a prior determination by the Commission that the charges it had paid were unreasonable. Although the suit was brought beyond the statutory period then permitted for suit on a commision order, the shipper contended that it was not barred under the local practice and the conformity act (R. S. § 914). This Court denied recovery, saying (236 U. S. at 667):

> "But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should be filed within two years *and not after*. Under such a statute the lapse of time not only bars the remedy but destroys the liability (*Finn* v. *United States*, 123 U. S. 227, 232) whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction."

In the next case, *Louisville Cement Co.* v. *Interstate Com. Comm.*, 246 U. S. 638, *supra*, the same rule was applied to a question of reasonableness. There the question

[3] The exception contained in Section 16(3)(d), *infra*, p. 84, is not relevant to the present case.

was whether a shipper's action to complain of unreasonable rates accrued when the shipment was made or when the overcharges were paid; the latter was held correct, and mandamus was awarded accordingly. But this Court, agreeing with the Commission, held that the two year period of limitations was jurisdictional. The Court said (246 U. S. at 642):

> "It is thus made very clear that the holding of the Commission was not that, having jurisdiction over the claim, upon consideration thereof, it was found to be barred by a statute of limitation, but that the language of the two-year provision placed it so beyond its power that it could not be considered at all, and that, for this reason, the petition, to the extent it related to the overcharges paid on February 1, 1911, was dismissed.
>
> "We agree with this conclusion of the Commission, that the two-year provision of the act is not a mere statute of limitation, but is jurisdictional,—is a limit set to the power of the Commission, as distinguished from a rule of law for the guidance of it in reaching its conclusion (*Interstate Commerce Commission* v. *Northern Pacific Ry. Co.*, 216 U. S. 538, 544). That such was the opinion of this court was clearly intimated in *Phillips Co.* v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662, 667, and it conforms in principle to the holdings of the court with respect to a similar limitation, but for six years, on the jurisdiction of the court of claims (*Ford* v. *United States*, 116 U. S. 213; *Finn* v. *United States*, 123 U. S. 227, 232; *United States* v. *Wardwell*, 172 U. S. 48, 52)."

The question next arose in another overcharge case, *Kansas City So. Ry.* v. *Wolf*, 261 U. S. 133, *supra*, where a shipper commenced suit for overcharges more than three years after the shipments and payments therefor had been made. No question of reasonableness was involved. Judgment for the shipper was reversed on the authority of *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, *supra*, the Court saying (261 U. S. at 139-140):

> "True it is that the claim of Phillips & Co. was based upon schedule tariff charges theretofore declared to be

unreasonable by the Interstate Commerce Commission, while here the payments demanded are said to exceed the published rates when properly applied. But the doctrine of the *Phillips* case and the reasoning advanced to support it, we think, are applicable to the circumstances of the instant cause. The lapse of time had destroyed any liability by the carrier to the shipper or his assignee for the alleged overcharges, and the demurrer should have been sustained."

In the next case, *William Danzer Co.* v. *Gulf R. R.*, 268 U. S. 633, *supra*, an action was brought to recover the amount of damages awarded against the carrier by the Interstate Commerce Commission. It was held that the provision of Transportation Act, 1920, to the effect that the period of Federal control of the railroads in World War I should not be computed as a part of the limitations period of the Interstate Commerce Act, could not be given effect to revive claims already barred, as the lapse of time destroyed the right and not merely the remedy. Therefore to allow the claim would be to create a liability retroactively and thus to deprive the defendant of its property without due process of law. Accordingly, judgment for the defendant was affirmed, this Court saying (268 U. S. at 636-637):

"Plaintiff's right to file his claim with the commission had expired several months before the passage of the Transportation Act. But, if the period of federal control is to be excluded, the complaint was filed within time. During the period between such expiration and the passage of the Transportation Act, plaintiff had no right to file a claim with the commission, and had no cause of action. It is settled by the decisions of this court that the lapse of time not only barred the remedy, but also destroyed the liability of defendant to plaintiff. *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, 666; *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638, 642; *Kansas City Southern Ry.* v. *Wolf*, 261 U. S. 133, 139. On the expiration of the two-year period, it was as if liability had never existed. * * *

"We need not re-examine the doctrine of *Campbell* v. *Holt*, 115 U. S. 620, as it is plain that case does not apply. * * * The decision [there] rests on the conception that the obligation of the debtor to pay was not destroyed by lapse of time, and that the statute of limitations related to the remedy only, and that the removal of the bar was not unconstitutional. The opinion distinguishes the case from suits to recover real and personal property. That case belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action are held to apply to the remedy only. But such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability. Such, for example, are statutory causes of action for death by wrongful act. [Citing cases.] This case belongs to the latter class. * * *"

Similarly, in *Louisville & N. R. R.* v. *Sloss-Sheffield Co.*, 267 U. S. 217, *supra*, a suit by a shipper to recover the amount of a reparation order entered by the Interstate Commerce Commission for excessive freight charges, the Court held that it was not fatal to the cause of action that the shipper filed a more detailed statement of claim after the expiration of the two years where the proceeding had been commenced within the two years, although, speaking through Mr. Justice Brandeis, it restated the principle herein discussed, saying (269 U. S. at 227), "It is true that the two-year requirement is jurisdictional."

More recently, in *Midstate Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356, the question was whether the parties, by agreement, could waive the statutory period of limitations, in an action brought by a carrier against a shipper to recover freight charges. This Court held that, since the statute barred the right, the period of limitations could not be waived. The Court said (320 U. S. at 363-364):

"* * * the decisions have fixed the pattern, in respect to a variety of issues relating to application of the limitations, that lapse of the statutory period 'not

> only bars the remedy but destroys the liability.' That is true of this Court's decisions and those of the inferior federal courts. It is true of suits by shippers against carriers and of suits by carriers against shippers."

The Government "questions" (U. S. B. 14, 21) the correctness of the conclusion below (R. 84-85) that its request for a reference came too late, urging (U. S. B. 25-27) that the limitations provisions of Section 16(3) of the Act (*infra* p. 84) does not run against the sovereign. No one will question that, in general, the United States is not bound by limitations. But here the issue concerns, not the standing of the litigant, but the power of the tribunal. Here, under an unbroken line of decisions in this Court, none of which has ever evoked so much as a dissenting vote, the expiration of the two year period terminates the power of the Commission to act. It is for that reason that the United States is in the same position as any other shipper. And the Government's contrary views in the present case can be explained only on the footing that it completely ignores—for assuredly it nowhere mentions—the *ratio decidendi* of the limitations cases. For aught that appears in the Government's brief, the consistent rulings by this Court that the lapse of the statutory period "not only bars the remedy but destroys the liability" (*Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, 667; *Midstate Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356, 363), that it is "a limit set to the power of the Commission" (*Louisville Cement Co.* v. *Interstate Com. Comm.*, 246 U. S. 638, 642), that "the two-year requirement is jurisdictional" (*Louisville & N. R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, 227), simply were never made. But it is only by thus completely shutting its eyes to the plainly expressed basis of an unbroken line of decisions that the Government can fashion its present argument.

B. The Commission has accordingly ruled that, since its power was terminated by the expiration of the period of limitations, the circumstance that the United States was the complaining party was immaterial.

Accordingly, since the limitation is jurisdictional, since it bars the right, since it limits the power of the Commission—a concept which, it is significant to note, was first formulated by the Commission itself in two early reports (*Blinn Lumber Co.* v. *Southern Pacific Co.*, 18 I. C. C. 430, 431; *Anaconda Copper Mining Co.* v. *Chicago & E. R. R. Co.*, 19 I C. C. 592, 594)—the conclusion necessarily follows that the sovereign's preferred status in other situations, where it is immune from ordinary limitations that go to standing to sue, is inapplicable. And the Interstate Commerce Commission has accordingly ruled, on the basis of the decisions of this Court discussed above, that it has no power to entertain an untimely complaint even when it is brought by the United States. *United States* v. *Director General*, 80 I. C. C. 143; *United States* v. *Southern Ry. Co.*, 286 I. C. C. 203; *War Materials Reparation Cases*, 294 I. C. C. 5, 12, reconsideration denied, 297 I. C. C. 635.

In the report first cited, the Commission ruled (80 I. C. C. at 150-151):

> "We have no jurisdiction to award reparation against the Wharton on interstate shipments delivered or tendered for delivery more than two years prior to the dates on which the complaints were filed with us and we make no finding with respect to the rates charged thereon. It is fundamental that we act only under the jurisdiction conferred upon us by the Congress. The power to award damages for violations of the act created rights as well as remedies. Failure to assert the right within the statutory period not only bars the remedy but destroys the right. *Phillips* v. *Grand Trunk Railway*, 236 U. S. 662; *Louisville Cement Co.* v. *Int. Com. Comm.*, 246 U. S. 638. In this respect the statute differs from the ordinary statute of limitations which, when invoked, bars only the remedy. The United States Government was not specifically excepted from the statutory requirement

> with respect to the time within which complaints for the recovery of damages must be filed with us, although it is specifically excepted from other provisions of the act."

The foregoing ruling was reapplied in *United States* v. *Southern Ry. Co.*, 286 I. C. C. 203, *supra*, where, after quoting the excerpt from the earlier case set out immediately above, the Commission said (p. 205):

> "That interpretation stood without challenge for many years, in the course of which the Congress twice reenacted section 16(3). We see no reason for now adopting a different interpretation."[4]

The Commission's view that the period of limitations in Section 16(3)(b) is binding on the Government was most recently reaffirmed in *War Materials Reparation Cases*, 294 I. C. C. 5, reconsideration denied, 297 I. C. C. 635, *supra*. There the Commission said 294 I. C. C. at 12: "The complainant [United States of America] contends that the Government is impliedly excepted from that provision. We have consistently refused to accept such an interpretation, our most recent decision being *United States* v. *Southern Ry. Co.*, 286 I. C. C. 203."

Here again, the Government's questioning of the correctness of these rulings (U. S. Br. 21) rests on its failure to appreciate the basis of this Court's decisions on which those rulings were expressly rested, namely, that the expiration of the period of limitations terminates the power of the Commission.

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[4] Affirmed, *United States of America* v. *Interstate Commerce Commission and United States of America*, Civil Action 1754-53, D. D. C., McGuire, J., December 21, 1955, unreported. In view of its affirmance of the Commission on the merits, the court considered the limitations point to be moot. No appeal was taken.

C. The rule that the period of limitations is jurisdictional is equally applicable to a judicial reference.

Insofar as it deals with the limitations cases at all, the Government argues that those few which it sees fit to cite were independent proceedings, and did not involve any question of referral to an administrative agency (U. S. Br. 19, 20-21).

But since the limitations provision is jurisdictional, limiting the power of the Commission, it would seem plain on principle that the Commission is equally without power whether its aid is invoked by a litigant in an independent proceeding, or by a court that, pursuant to well-settled doctrine (e. g., *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134; *Smith* v. *Hoboken R. Co.*, 328 U. S. 123; *Tank Car Corp* v. *Terminal Co.*, 308 U. S. 422; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247), suspends proceedings to obtain the Commission's administrative determination of reasonableness when such an issue arises in a pending judicial proceeding.

What appears plain on principle is indeed equally plain on authority, for this Court has specifically ruled—in a case neither cited nor discussed by the Government—that a court will not be directed to refer a matter to the Commission after the time for the Commission to make the administrative determination has expired. *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304.

In the *Morrisdale Coal Co.* case, the shipper brought suit for damages against the carrier, seeking damages for what was alleged to be a discriminatory apportionment of cars during a car shortage. No prior determination of reasonableness having been sought from the Commission, the case was dismissed. The shipper argued that, if failure to make application to the Commission was, as held, jurisdictional, then the case should not be dismissed, but should be stayed to permit application to the Commission. But this Court held that, since such application was barred

by limitations, there was no basis for a reference to the Commission. The Court said (230 U. S. at 314-315):

> "It is argued in the plaintiff's brief that if this view of the law should be sustained the case should not be dismissed but stayed until the plaintiff could apply to the Commission and obtain a ruling on the question as to whether the method adopted by the Pennsylvania Railroad was not, during the years 1900 to 1906 unjustly discriminatory. Attention is called to *Southern Ry.* v. *Tift*, 206 U. S. 428, 434, which it is said would support such a provision in the mandate. In that case the shippers filed, on April 14, 1903, a bill to enjoin an advance in rate. The injunction was refused and the advance went into effect. The cause was stayed while the complainants were pressing their application for an order from the Commission that the rates were unreasonable. Its report was in their favor and on it the Circuit Court made an order of restitution (206 U. S. 436). But, in that case the statute of limitations had not run when the bill was filed, when the stay order was granted, nor when the application was made to the Commission; while in the present case the plaintiff was barred of the right to apply to the Commission at the date the suit was filed in the United States Circuit Court. The damages which were claimed arose from a failure to deliver cars prior to December 31, 1905. The suit was brought July 17, 1908, more than two and a half years later, and after the passage of the act of June 29, 1906, 34 Stat. 584, 590, c. 3591, that 'all complaints for the recovery of the damages shall be filed with the Commission within two years from the time the cause of action accrued, and not after and a petition for the enforcement of an order shall be filed in the Circuit Court within one year from the date of the order and not afterwards; Provided that claims accrued prior to the passage of this act may be presented within one year.'
>
> "The provisions of this statute would prevent the modification asked for, and the judgment is *Affirmed.*"

We consider that the *Morrisdale Coal Co.* case, which has never been modified or questioned, is controlling here, and that it requires affirmance of the Court of Claims on the first question presented by the Government.

There are no persuasive authorities to the contrary. Both of the Eighth Circuit decisions relied on by the Government (U. S. Br. 21-22) ignore the decisive *Morrisdale Coal Co.* case. *United States* v. *Kansas City Southern Railway Co.*, 217 F. 2d 763; *Northern Pacific Ry. Co.* v. *United States*, 213 F. 2d 366. They can accordingly hardly be regarded as weighty. The same is true of a solitary ruling of the Interstate Commerce Commission, *Arizona Sand & Rock Co.* v. *Southern Pac. Co.*, 280 I. C. C. 285, also decided, so far as appears from the report, in the same utter unawareness of the *Morrisdale Coal Co.* case.[5]

In short, not only the Government, but also the scattered authorities on which it relies (U. S. Br. 21-24), ignore the one decision of this Court that is precisely in point. Whether this curious coincidence reflects silent acquiescence in our view that *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304, is determinative here, or whether that similarity of position is a consequence of only sketchy acquaintance with the authorities, is not for respondents to say.

D. The rule that a longer period of limitations is applicable to suits for overcharges in the Court of Claims was not raised below, was not challenged in the Government's petition for certiorari, and is not open for reexamination here.

The general rule that the limitations provisions of the Interstate Commerce Act are jurisdictional has not always been consistently applied to judicial proceedings for the recovery of over- or undercharges. Thus, in *DuPont de Nemours & Co.* v. *Davis*, 264 U. S. 456, this Court held that an action to recover demurrage charges, brought on behalf of the Director General as representative of the United States, was not barred by limitations because of the sovereign's traditional immunity from such defenses.

[5] We point out below, pp. 42-45, that, contrary to the Commission's assumption there, nothing in the Administrative Procedure Act enlarges the power of the Commission to entertain a reference once the period of limitations has run.

Accord: Shutt v. *United States,* 218 F. 2d 10 (C. A. 5). Similarly, the Court of Claims has recently held that the Government's counterclaim for railroad overcharges would be entertained regardless of the time when its cause of action accrued. *Atlantic Coast Line Railroad Co.* v. *United States,* 140 F. Supp. 569 (May 1, 1956).

By parity of reasoning, the Court of Claims has consistently held, for some thirty years, that suits by carriers in that court to recover unpaid balances from the United States as shipper were limited only by the six year statute there applicable. *Southern Pacific Co.* v. *United States,* 62 C. Cls. 391; *Seaboard Air Line R. Co.* v. *United States,* 113 C. Cls. 437, certiorari denied, 338 U. S. 848; *Union Pacific R. Co.* v. *United States,* 114 C. Cls. 714, certiorari denied, 339 U. S. 930.

As the last two citations show, this Court twice refused to review the Court of Claims' holdings as to the scope of its jurisdiction in that regard (Nos. 212 and 580, Oct. T. 1949).

In the present case, the Court of Claims' jurisdiction to entertain respondents' suits was not questioned there,[6] nor was the question of that court's jurisdiction presented in the Government's Petition for Certiorari here (No. 559, Oct. T. 1955).[7]

Now, however, the Government seeks to raise this precise question (U. S. Br. 13-14), and devotes the entire

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[6] "* * * the Court of Claims has consistently held that the two-year limitation period established [by Sec. 16(3)] does not apply to suits brought by carriers against the United States. [Citing the two cases in which certiorari was denied at the 1949 Term.] This ruling, which was not challenged in the instant cases because of the prior decisions, opened the way to consideration of the claims against the United States here asserted by respondents." U. S. Pet. 11-12, in the present case.

[7] The estoppel point, though not listed among the questions presented, was duly reserved. U. S. Pet. 3, n. 1.

Appendix to its brief (U. S. Br. 43-58) to excerpts from its denied petitions for certiorari in the earlier cases, Nos. 212 and 580, Oct. T. 1949.

We doubt whether the files of this Court will disclose any similar attempt to serve up warmed-over arguments after a lapse of nearly seven years. But the conclusive answer to the Government's effort to enlarge the scope of review in this case at this time is that this Court's rules join with its unbroken practice in forbidding what has very properly been characterized as a "practice of smuggling additional questions into a case after we grant certiorari" (Jackson, J., in *Irvine* v. *California*, 347 U. S. 128, 129).

It has long been settled that "One having obtained a writ of certiorari to review specified questions is not entitled to obtain decision on any other issue." *General Talking Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 179. That doctrine was first codified in Rule 38(2) of 1939, 306 U. S. 717: "Only the questions specifically brought forward by the petition for writ of certiorari will be considered." Repeatedly and recently reaffirmed (*e.g., Radio Officers* v. *Labor Board*, 347 U. S. 17, 37, n. 35; *Mazer* v. *Stein*, 347 U. S. 201, 208), it was restated in the present Rules at two places.

Rule 23(1)(c), prescribing the arrangement of the petition for certiorari, states specifically that "Only the questions set forth in the petition or fairly comprised therein will be considered by the court." And Rule 40(1)(4)(2), dealing with briefs, goes on to say that "The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents."

Here the Government's excuse for now raising an additional question in square violation of the Rules is (U. S.

Br. 13-14) the contention that "the court is always free to consider, of its own motion, jurisdictional questions * * *."

Plainly, there is no such exception, certainly not in such broad terms. Once past the jurisdiction of this Court, which is of course always open, there must be a lack of jurisdiction in the court below based upon the public policy set forth in the Eleventh Amendment (*Ford Co.* v. *Dep't of Treasury*, 323 U. S. 459, 467) or upon the limitations of federal jurisdiction generally (*cf. Mitchell* v. *Maurer*, 293 U. S. 237, 244). The jurisdiction of the lower court must be, as one Justice has expressed it, "plainly wanting."[8]

It may well be doubted whether the issue now sought by the Government to be injected in this case—which, after all, is simply whether a two or a six year statute of limitations is applicable to a particular class of claims against the United States—is jurisdictional in the sense that the immunity declared by the Eleventh Amendment, or the constitutional restrictions upon the scope of federal judicial power, may be deemed jurisdictional for purposes of carving an exception out of the rule that a brief on the merits may not raise new questions.

But, in any event, it certainly cannot be contended here, in the face of an unbroken line of rulings in the Court of Claims for thirty years to the effect that it does have jurisdiction of these cases, that its jurisdiction still is "plainly wanting." Nor, after this Court has twice advisedly refused to review the precise issue, can it fairly be urged that by mere lapse of time what was then left undisturbed has now ripened into "plain error" within the meaning of Rule 40(1)(d)(2). Even if the point were

[8] "I had supposed that no rule of judicial administration was better settled than that the Court should restrict itself to the questions presented in a petition for certiorari. * * * The exceptions to this rule are rare, as where the jurisdiction of this Court or of the lower courts is plainly wanting, or where a patent error *in favorem vitae* is to be noted." Frankfurter, J., concurring, in *Woods* v. *Stone*, 333 U. S. 472, 478.

open for decision on the merits, the circumstance that the Court of Claims decisions from 1926 on survived the general revision of the limitations provisions effected by the Transportation Act of 1940 would, on familiar principles, amount to congressional ratification thereof. *Cf. Apex Hosiery Co.* v. *Leader,* 310 U. S. 469.

But the point is not open. There is no warrant whatever for the Government's present effort to reopen, seven Terms out of time, two of its denied petitions for certiorari. And we submit that this Court should discountenance the Government's injection into this case, in violation of the Rules and practice of the Court, of questions not put forward in its petition for certiorari.

E. There is no unfairness in the result.

The Government attacks the result below, urging (U. S. Br. 14) that in being now denied access to the Commission it is inhibited in its defense of the suits brought by respondents, and that (U. S. Br. 20) it "loses a defense available to all other shippers."

But the defense in question is that the charges are unreasonable, a defense which, as the Government itself recognizes (U. S. Br. 16-17), cannot be availed of in a court. That issue, plainly, can be determined only by the Commission. And if a private shipper sought to have a judicial proceeding stayed to permit an issue of unreasonableness referred to the Commission after the Commission, by reason of limitations, had lost its power to make a determination thereon, the private shipper would lose its defense too. *Morrisdale Coal Co.* v. *Pennsylvania R. Co.,* 230 U. S. 304, *supra.* The ruling below, therefore, does not place the Government in a more disadvantageous position by comparison with other shippers.

Indeed, the Government in at least one respect is in a substantially better position than a private shipper sued by a carrier for undercharges. In that situation, any set-

off that the private shipper desires to assert against the carrier is, necessarily, subject to limitations. E. g., *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662. But the Government can successfully set off a claim for overcharges regardless of when that claim accrued. *Atlantic Coast Line Railroad Co.* v. *United States,* 140 F. Supp. 569 (C. Cls.)

Thus weak in point of law, the Government resorts to adjectives. It characterizes the result below as "anomalous" (U. S. Br. 14), as "uneven" (U. S. Br. 19) and "grossly uneven" (U. S. Br. 11, 16), complains of "unfairness" (U. S. Br. 18), and concludes on the crescendo of "gross unfairness" (U. S. Br. 22).

But, if the situation is dispassionately viewed, there is no unfairness. The United States chose to avail itself of the right, not open to other shippers, to make set-offs under 49 U. S. C. §66.[9] Whether that right represents the sturdy exercise of "self-help," as the Government characterizes it (U. S. Br. 19), or whether, as a host of Court of Claims judgments evidence, it is essentially arbitrary in its operation, we need not now pause to discuss. The point is that, having invoked the views of the General Accounting Office on transportation rates in preference to the informed and expert judgment of the Interstate Commerce Commission thereon at a time when the Commission still had power to express an opinion, the Government can hardly now be heard to complain of unfairness—nor to insist that, after all, this is a Commission matter.

Here, as in *United States* v. *Munsingwear,* 340 U. S. 36, 40, the United States "did not avail itself of the remedy it had to preserve its rights." Here, as in the *Munsingwear* case (340 U. S. at 41), "The case is therefore one

[9] It is said (U. S. Br. 20) that this procedure "results in the settlement of numerous controversies without the necessity of litigation." What this means, of course, is that a good many victims of the Comptroller General's actions under that provision are in no position to litigate, not that they agree with his determinations.

where the United States, having slept on its rights, now asks us to do what by orderly procedure it could have done for itself."

There is simply no basis now for affording the United States a fourth advantage over private shippers (*cf.* pp. 19-23 *supra*), particularly where, as has been amply demonstated, the advantage sought is beyond the power of the agency concerned to grant.

III. THIS COURT HAS CONSISTENTLY REFUSED TO DIRECT A REFERENCE TO AN ADMINISTRATIVE AGENCY WHERE SUCH REFERENCE WOULD SAVE NO RIGHTS.

A. Reference to an administrative agency will not be ordered where the agency either lost or never had jurisdiction to determine the issue sought to be referred.

Ever since *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, it has been settled law that, in any action seeking damages for alleged violations of the Interstate Commerce Act, courts have no jurisdiction to determine questions of reasonableness which may be involved in such lawsuits and that jurisdiction to determine such questions is vested exclusively in the Commission. And ever since *Southern Railway Co.* v. *Tift*, 206 U.S. 428, decided at the same Term, it has likewise been settled that, where the suit involves questions of reasonableness arising under the Act, it is proper to suspend proceedings to permit the Commission to adjudicate such questions. Later decisions have hardened the permissive into the mandatory; where the reasonableness or legality of the practices of the parties was subject to the exclusive jurisdiction of the Commission, the court must stay its hand until the Commission has passed on the mater. See, e.g., *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 147; *Tank Car Corp.* v. *Terminal Co.*, 308 U.S. 422, 433; *Smith* v. *Hoboken R. Co.*, 328 U.S. 123; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U.S. 247, 267, all cited at U.S. Br. 17-18.

But each of these cases, and every other decision of this Court relied on by the Government, differs from the case at bar. In none of those cases was there any question as to lack of jurisdiction, by reason of limitations or otherwise, in the administrative agency. In each instance, the question referred was one as to which the agency was competent to give an answer.

Where, however, the time for making application to the administrative agency has expired, then the proceedings will not be stayed, for then no purpose would be served in doing so. *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U.S. 304, discussed *supra*, pp. 31-33. There, as this Court later said, "no rights could be saved by retaining the cause." *Tank Car Corp.* v. *Terminal Co.*, 308 U.S. 422, 433, note 15. The Government's utter failure to refer to the *Morrisdale* case anywhere in its brief necessarily undercuts substantially its present contentions.

The *Morrisdale* case is, if anything, stronger today against the Government's arguments here than when it was decided, by reason of the subsequent formulation of the rule that expiration of the period of limitations deprives the Commission of power. *Phillips* v. *Grand Trunk Ry.*, 236 U.S. 662; *Louisville Cement Co.* v. *Interstate Com. Comm.*, 246 U.S. 638; *William Danzer Co.* v. *Gulf R. R.*, 268 U.S. 633; *Louisville & N. R. R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217. Under that rule it is even plainer than it was in 1913, when *Morrisdale* was decided, that there is no basis whatever at this time either for reference of the present case to the Commission by the court below or for suspension of its proceedings to permit the Government independently to apply to the Commission for a determination as to reasonableness. The right so to apply no longer exists, under the decisions cited; and, very plainly, judicial proceedings are not to be stayed for vindication

of non-existent rights. The law does not require courts to perform vain or nugatory acts.[10]

Similarly, reference to the Commission will not be made where the Commission has already determined the issues. *Crancer* v. *Lowden,* 315 U.S. 631. There again, no rights could have been saved.

Likewise, no reference will be made where the administrative agency has no jurisdiction to make the determination that is sought. *Montana-Dakota Co.* v. *Public Serv. Co.,* 341 U.S. 246. In that case, the question was as to the reasonableness of a rate under the Federal Power Act. The district court in which relief was sought had of course no jurisdiction to make such a determination, and under the provisions of the Federal Power Act the Federal Power Commission had no jurisdiction to award reparation. This Court accordingly held that the matter was not one proper for reference to that Commission, saying (341 U.S. at 254):

> "If the court is presented with a case it can decide but some issue is within the competence of an administrative body, in an independent proceeding, to decide, comity and avoidance of conflict as well as other considerations make it proper to refer that issue. But we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. The fact that the Congress withheld from the Commission power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly."

We deem the *Montana-Dakota* case likewise controlling in the present litigation. There the Federal Power Com-

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[10] *McMicking* v. *Schields,* 238 U.S. 99, 103; *Sims* v. *Everhardt,* 102 U.S. 300, 310; *Peters* v. *Bowman,* 98 U.S. 56, 60; *Tacey* v. *Irwin,* 18 Wall. 549, 591; *United States* v. *Reyburn,* 6 Pet. 352, 367; Co. Litt. *127b (*Lex non praecipit inutilia*).

mission never had jurisdiction to grant reparation. Here the Interstate Commerce Commission has lost jurisdiction to determine any question of reasonableness. In either case a reference to the commission concerned would be futile.

It is true that *Montana-Dakota* was decided by a closely divided Court. But even espousal of the minority views in that case would not help the Government here. There the dissenting members of the Court, while agreeing that there was no statutory remedy, were of opinion that the district court should none the less fashion one under its equitable powers. See 341 U.S. at 261-266. Here, however, there was a remedy. Here the Government had the right to apply to the Commission for an adjudication on its contention that the rates were unreasonable. But the Government advisedly failed to invoke that right and instead chose to exercise its right of statutory set-off under 49 U.S.C. §66. Having elected one remedy and lost, it cannot now be permitted to revert to its other remedy, which the agency concerned at this time is powerless to grant. In that setting there is no occasion now to recanvass the issues that divided the Court in *Montana-Dakota*.[11]

B. Nothing in the Administrative Procedure Act enlarges the power of the Interstate Commerce Commission to make determinations as to reasonableness after the period of limitations has expired.

The Government relies strongly (U.S. Br. 23-24) on a report of Division 2 of the Commission in *Arizona Sand & Rock Co.* v. *Southern Pac. Co.*, 280 I.C.C. 285, where it was held that the period of limitations contained in Section 16(3) of the Interstate Commerce Act did not preclude the Commission from answering a reference made by a court. Division 2 said (*id.* at 286);

[11] Lest there be even a possibility that silence on the point could be construed as acquiescence, we add here simply that we cannot accept the strained reading of the *Montana-Dakota* case that the Government sets out at U.S. Br. 24.

"Most of the shipments here considered were delivered or tendered for delivery more than 2 years prior to the date of filing of the complaint. The complaint was not filed within 90 days from the time suit was instituted. However, it is the practice of the Commission to assist the court in instances of the kind stated in the order quoted above. Appropriate findings and a declaratory order in proceedings such as this are authorized by section 5(d) of the Administrative Procedure Act, which reads as follows;

" 'DECLARATORY ORDERS.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.' "

Apart from the circumstance that this was a report by a Division rather than the full Commission, the conclusion reached is demonstrably wrong.

First. The report does not consider the controlling case of *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U.S. 304, discussed *supra*, pp. 31-33, which holds squarely that a reference will not be made after the period of limitations has run, nor does it reflect any awareness of the settled rule, see pp. 23-30 *supra*, that the expiration of the period of limitations destroys the power of the Commission.

Second. The report completely misapprehends the scope of Section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 1004 (*infra*, p. 86).

That provision must be read in connection with the introductory paragraph of Section 5, as follows:

"In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved * * * (5) cases in which an agency is acting as an agent for a court; * * * (d) The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty."

Whether exception (5) in the first paragraph of Section 5 includes the reference now sought by the Government, or whether it is limited to a situation of direct agency, as under the provision authorizing suits under the antitrust laws to be referred to the Federal Trade Commission as a master in chancery (15 U.S.C. §47), we need not stop to inquire, because it is plain that the power to issue declaratory orders does not enlarge jurisdiction.

The federal courts were first given jurisdiction to render declaratory judgments by the Federal Declaratory Judgment Act of June 14, 1934, c. 512, 48 Stat. 955, now 28 U.S.C. §§2201, 2202. The operation of that Act, as this Court has said, "is procedural only." *Ætna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 240. "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." *Skelly Oil Co.* v. *Phillips Co.,* 339 U.S. 667, 671. The range of remedies was enlarged in the sense that the traditional equity requirements of prayer for injunction and allegation of irreparable injury were not necessary to a declaratory judgment. See *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U.S. 249, 262-263. But the authorization to render declaratory judgments did not, because it could not, also eliminate the normal constitutional requirements requisite to federal jurisdiction, viz., existence of a case or controversy, diversity of citizenship, existence of a federal question, etc. *Skelly Oil Co.* v. *Phillips Co., supra,* 339 U.S. at 671-674.

So here: The mere power to issue declaratory orders, "with like effect as in the case of other orders" (Administrative Procedure Act, Sec. 5(d), *infra* p. 86), does not enlarge the Interstate Commerce Commission's jurisdiction so as to give it power to issue declaratory orders after expiration of the period of limitations, where, under a consistent line of its own rulings and of decisions of this Court, its very power to make any determination terminated when the two year period expired.

It should be added that the foregoing conclusion is entirely consistent with the legislative history of Section 5(d) of the Administrative Procedure Act. See Sen. Doc. 248, 79th Cong., 2d sess., pp. 25, 204, 263.[12] Thus it was said in both committee reports (*id.*, pp. 204, 263), "The administrative issuance of declaratory orders would be governed by the same basic principles that govern declaratory judgments in the courts."[13]

The construction now urged by the Government is not only at variance with the text of the Act and of the Committee reports thereon, it is also at variance with and unsupported by the Department of Justice's contemporaneous interpretation. See *Attorney General's Manual on the Administrative Procedure Act* (1947), pp. 59-60.

Plainly, therefore, if the Commission had no jurisdiction before the effective date of the Administrative Procedure Act, it had none thereafter.

C. Even if a reference were made here, relief for the Government would be very doubtful.

Assuming—but only for purposes of argument—that the Commission still had power to determine the reasonableness of the rates now in question, relief for the Government would be, at the very least, extremely problematical, as *War Materials Reparation Cases,* 294 I.C.C. 5, reconsideration denied, 297 I.C.C. 635, shows.

There the Commission considered seventeen complaints filed by the Government which alleged that the rates and charges for handling Government freight during the war years 1941 to 1946 were unjust and unreasonable, including two cases, Docket Nos. 29822 and 29861, that involved ammunition (including incendiary bombs), explosives, and ammunition components.

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[12] A document collecting all of the hearings, committee reports, and floor debates on the measure.

[13] Sen. Rep. 752, 79th Cong., 1st Sess., p. 18; H. R. Rep. 1980, 79th Cong., 2d sess., p. 31.

All of the latter shipments were handled by the railroads for the Government under Section 22 agreements at approximately 65 per cent of first-class rates, without land grant deductions. 294 I.C.C. at 137-146. It is pointed out in the Commission's report (*id.*, at 139) that during the period included in the complaints the rating on these commodities generally ranged from Class 32½ to Class 75 [i.e., percentages of first class], and that in Montana-Pacific territory and transcontinental territory commodity rates prevailed to an important extent; that at the request of the War Department the railroads made a Section 22 quotation of Class 65 on ammunition and explosives in carloads, minimum 50,000 pounds, applicable throughout the United States, not subject to land grant deductions; and that the quotation appeared to have been reasonably satisfactory to the Government officials chiefly concerned until some time in 1945.

With respect to the factor of hazard, the Commission said (294 I.C.C. at 144):

> "How much should be included in the rates in recognition of hazard is necessarily a matter of judgment. The amount could not be measured solely by property loss from the handling of this traffic during the war, even if it were possible, as it is not, to make a satisfactory estimate of that amount. It is clear that, everything considered, the item was smaller than it might well have been under the circumstances, but it must be remembered that a major factor in the relatively favorable result was the costly service accorded to this traffic."

The Commission accordingly found that the railroads were not shown to have violated the Interstate Commerce Act in respect of any of the rates, charges, and practices assailed, and in consequence dismissed the Government's complaints.[14]

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[14] We are advised that no proceeding seeking judicial review of the Commission's report in these cases will be filed.

Apart from the consideration last named, which admittedly verges on the speculative, it is clear that, since the Government's right to apply to the Commission for a determination of its contention that the rates involved in the present case are unreasonable has long since ceased to exist, the Court of Claims correctly held that there was no occasion for a reference to the Commission. Its holding in this respect should accordingly be affirmed.

IV. THE COURT OF CLAIMS PROPERLY CLASSIFIED THE SHIPMENTS AS INCENDIARY BOMBS.

A. The issue of the propriety of summary judgment below, not having been presented in the petition for certiorari, is not open now.

At the outset of the substantive issue in the present case—the proper classification of the shipments in question—the Government completely changes its position, and now seeks to obtain decision on still another question that it did not see fit to present in its petition for certiorari.

In that document (Pet. 2-3, Question 2; 19-21), it presented the question decided adversely to it by the Court of Claims, namely, whether the rate for incendiary bombs was applicable to such bombs less bursters and fuzes. Now it all but abandons that point, saying (U.S. Br. 35), "We do not argue that this Court need resolve the question of tariff interpretation."[15] And it shifts to a wholly different issue, and now argues that the Government's affidavits in opposition to respondents' motions for summary judgment demonstrated that there were genuine issues of material fact (U.S. Br. 27-35). It accordingly

[15] Perhaps that admission is tantamount to a concession that certiorari should not have been sought in respect of the question of classification. Certainly it may be ventured with some degree of assurance that, had the decision below been the other way, a petition for certiorari by the carriers to review the Court of Claims' ruling as to the correct interpretation of the tariff would not have been successful.

asks (U.S. Br. 35) "that the Court exercise its supervisory powers to assure the Government its day in court on those issues." No such contentions were even remotely suggested in the petition for certiorari.

Plainly, this is an attempt to "change the substance of the questions already presented" which is expressly forbidden by Rule 40 (1)(d)(2) and by this Court's consistent certiorari practice. See pp. 25-37, *supra*, where the uniform authorities against any such enlargement are set forth and discussed; and of course in this instance there is no suggestion that the new issue now tendered is in any sense "jurisdictional".

We point out below, pp. 51-58, at an appropriate place in our argument as to the correctness of the classification made by the Court of Claims, that analysis of the Government's affidavits submitted in opposition to respondents' motions for summary judgment shows that they did not in fact raise any issues of fact, and that summary judgment below was accordingly amply warranted.

But we submit that it should not be necessary for us even to deal with that issue, which was not involved in this case as it was presented here in the petition for certiorari. If a private party were petitioner, he could not expect with impunity thus to expand the questions open for decision. And private respondents should not be required to have to defend themselves against every contention capable of occurring to successive echelons of Government lawyers as they seek to shore up what on further reflection appears to be a losing lawsuit in the posture in which it was originally presented. We submit that this Court should once more express its disapproval of a course so plainly irregular and so completely unwarranted.

We argue, first, that the question for judicial decision is solely one of classification under published tariffs, under which issues of reasonableness or unreasonableness

are not open; second, that the record discloses no unresolved question of fact (as distinguished from questions of opinion or interpretation), so that summary judgment was properly awarded; and, third, that under well settled rules of rate classification the ruling below was clearly correct.

B. The question is solely one of classification under published tariffs, which the Court of Claims had jurisdiction to determine, and under which issues of reasonableness and unreasonableness were not open to either party.

Respondents were suing for undercharges, contending that petitioner—the shipper—failed to pay the applicable rates (R. 1-2A, 23-41, 54-61). It is settled that the Commission has no jurisdiction of a carrier's claim for unpaid charges, *J. G. Falls & Co.* v. *Chicago, R. I. & P. R. Co.*, 15 I.C.C. 269; *Heid Bros.* v. *El Paso and Northeastern R. Co.*, 55 I.C.C. 416, and it is equally well settled that the courts do have jurisdiction in such cases. *Great Northern Ry.* v. *Merchants Elev. Co.*, 259 U.S. 285; *Reconstruction Finance Corp.* v. *Spokane, P. & S. Ry. Co.*, 170 F. 2d 96 (C. A. 9); *Texas & Pacific Ry. Co.* v. *Sonken-Galamba Corp.*, 100 F. 2d 158 (C. A. 5); *Pennsylvania R. Co.* v. *Fox & London*, 93 F. 2d 669 (C. A. 2); *American Ry. Express Co.* v. *Price Brothers*, 54 F. 2d 67 (C. A. 5).

The Court of Claims has regularly and in many cases been called upon to decide controversies similar to the present one, involving disputes as to the proper classification of an article or commodity under published rates. *Pennsylvania R. R. Co.* v. *United States*, 70 C. Cls. 276 (surgical bandages); *Atchison, T. & S. Fe Ry. Co.* v. *United States*, 74 C. Cls. 154 (airplane pontoons); *Erie Railroad Co.* v. *United States*, 79 C. Cls. 102 (bomb sights); *Union Pacific R. Co.* v. *United States*, 117 C. Cls. 534 (jeeps); *Motor Cargo, Inc.* v. *United States*, 129 C. Cls. 493 (machine gun parts). And in other cases the Court of Claims has construed and applied the published tariffs

to determine whether or not the carrier had been paid in full for the service performed. *Atchison, Topeka & S. F. Ry. Co.* v. *United States,* 81 C. Cls. 346 (minimum carload weights); *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States,* 97 C. Cls. 271 (station index numbers); *Atchison, Topeka & Santa Fe R. R. Co.* v. *United States,* 123 C. Cls. 127 (switching charges); *Pennsylvania R. Co.* v. *United States,* 129 C. Cls. 781 (transit allowances).

It is also settled, by the long line of cases beginning with *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426, that the defense of unreasonableness is within the exclusive jurisdiction of the Interstate Commerce Commission. The Court of Claims so held in the earlier incendiary bomb case, *Union Pacific Railroad Co.* v. *United States,* 125 C. Cls. 390, 394, and the Government, which seeks to have that question referred to the Commission, apparently agrees—although its classification argument (U.S. Br. 33-35) is interlarded with contentions going to hazard which are of course simply contentions that the rate held applicable is in fact unreasonable.[16] And the argument of the dissenting judges below (R. 86), when analyzed, amounts simply to a disposition to let the Government prove the unreasonableness of the rate in the Court of Claims.[17]

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[16] The Government throughout its brief (U. S. Br. 2, 7, 12, 16, 27, 34, 36, 37) refers to "high first-class rates". Perhaps the thought is that any rate that is high is in consequence unreasonable, and hence a subject for judicial condemnation. It is however not necessary to pursue this semantic speculation, for the fact—which, it needs hardly to be added, does not appear in the Government's brief—is that the rates on ammunition, explosives, and ammunition components ranged from 32½ to 75 per cent of first class rates and averaged 65 per cent of such rates. *War Materials Reparation Cases,* 29 I.C.C. 5, 137-146, espy. at 139-141, reconsideration denied, 297 I.C.C 635. Even if it can be said that 65% of a first class rate is still necessarily "high", that would only raise a question of reasonableness.

[17] "If the reason for the high freight rate is the incendiary quality of the freight, and if the freight does not have the incendiary quality, the reason for the high rate vanishes and the rate should vanish with it." (R. 86.)

We prefer to rest on what the Court of Claims unanimously held in the first incendiary bomb case, 125 C. Cls. at 394:

> "As previously stated, the hazards involved in the transportation of the shipments for which plaintiff is suing were not as great as would have been the case had the articles been shipped fully assembled. And it may well be that a lower tariff rate should apply to the carriage of the less hazardous incendiary bomb. This question is not within our jurisdiction, however, as the question of the reasonableness of rates is a matter entrusted by Congress solely to the Interstate Commerce Commission."

And, as we have shown above, pp. 31-33, 39-45, no such reference can now be made, since the Commission's power to determine the tendered issue has ceased to exist.

C. The record in this case raises no factual issues, and accordingly summary judgment was properly awarded.

In order to ascertain what was and what was not before the Court of Claims in the present case, its relationship to the earlier incendiary bomb case must first be examined.

The gist of the Court of Claims' holding in the earlier litigation was (125 C. Cls. at 393):

> "We are of the opinion that when a steel bomb body, such as the M76 or M47 A2, is filled with an incendiary gel, such as PT1 or NP, it is an incendiary bomb, regardless of whether it contains a burster and fuze. While the absence of the burster and fuze admittedly renders the shipment of the article less hazardous from a transportation standpoint, the only logical description of such an article is as an incendiary bomb. The articles as described on the bills of lading were incendiary bombs without bursters and fuzes, and they had no purpose or use except as incendiary bombs."

It was admitted below in this case that the articles in question were like those in the earlier *Union Pacific* case (R. 5, Item 2; R. 43, 44, Item 3; R. 56, 63, Item 3).

The Court of Claims accordingly held in the present case (R. 84) that:

> "These cases present the same questions which the court considered and answered in the case of *Union Pacific Railroad Company* v. *United States,* 125 C. Cls. 390. A reconsideration of the question of classification of the articles as 'bombs or mines' under item 1820 of Consolidated Freight Classification No. 16, leads us to the same conclusion. The facts are the same and no purpose would be served by reciting again the historical facts in our former opinion and the facts in the instant case."

There are no factual differences in the present record that would warrant a different result. Indeed, the "facts" set out in the Government's *ex parte* affidavits below (R. 8-22, 72-83), from which both its statement (U.S. Br. 5-6) and its argument (U.S. Br. 28-33) here are drawn—those "facts", as distinguished from expressions of opinion, do not contradict in the slightest any of the facts found by the Court of Claims in the earlier case.

We set forth immediately below the relevant excerpts from the Government's statement here and the findings of the Court of Claims in the first incendiary bomb case:

Government's Brief	*Union Pacific Findings*
Napalm gel is gasoline which has been thickened or gelatinized by the addition of aluminum soap powders (R. 8, 10, 11, 13). [U. S. Br. 5.]	NP gel • • • is described in War Department Field Manual 3-6—"Employment of Air Chemical Munitions"—as • • • Gel of Napalm in gasoline. Napalm is mixture of metallic soaps. [Fdg. 3(b).]
This mixture is not capable of spontaneous combustion, is not	Although PT1, NP, and IM gasoline-thickened gels are high-

Government's Brief	*Union Pacific Findings*
self-igniting, and is not, therefore, incendiary (R. 8, 9, 10, 12, 13, 76-78, 79); like wood, paper, and a host of other articles, it will burn if ignited, but some outside incendiary agent must be supplied to set it on fire (R. 9, 10-11, 12, 13, 76-78, 79). [U. S. Br. 5.]	ly inflammable, they are not self-igniting. [Fdg. 10.] PT1 and NP, although not self-igniting, are incendiary mixtures • • •. [125 C.Cls. at 392.]
In a completed incendiary bomb, capable of functioning as such, the incendiary agent which ignites the Napalm gel is contained in the burster charge (R. 8, 10, 12, 13, 77). [U. S. Br. 5.]	A completed incendiary bomb, capable of functioning as such in the field, consists of a bomb body or shell filled with inflammable material, such as the PT1 or NP gel, and equipped with a burster and fuze to open the bomb body and scatter and ignite the inflammable material. [Fdg. 9.]
The burster is a steel tube inserted in the nose of the bomb and extending through its center, which contains a column of explosive TNT and a column of white phosphorous (R. 10). [U. S. Br. 5.]	The burster is a steel tube inserted in the nose of the bomb and extending through its center. The burster contains a small central well in which there is inserted a ¼-inch column of pelleted tetrol or TNT. The burster tube also contains a column of white phosphorus, which is poured in as a liquid and allowed to solidify. [Fdg. 9.]
The function of the explosive is to rip open the steel bomb case and scatter its contents. [U. S. Br. 5.]	The function of the explosive is to open the bomb case and scatter the contents. [Fdg. 9.]
The white phosphorous is the incendiary or self-igniting agent, which ignites in the air when	The white phosphorous ignites in the air when plasted out by the explosive charge and is the ele-

Government's Brief	*Union Pacific Findings*
blasted out by the explosive charge and sets the Napalm gel on fire (R. 12, 79). [U. S. Br. 5.]	ment which ignites the gel. [Fdg. 9.]
In addition, a complete incendiary bomb contains a fuze. The fuze is a device in the nose of the bomb which, on impact, sets off a primer *cup* [*sic*] with a small explosion sufficient to fire the burster. [U. S. Br. 5.]	The fuze is a device in the nose of the bomb which, on impact, sets off a primer cap with a small explosion sufficient to fire the burster. [Fdg. 9.]
The burster and fuze represent more than 75% of the construction cost of a complete bomb, whereas the steel case and Napalm filler comprise less than 25% of the cost (R. 10-11). [U. S. Br. 5.]	[No comparable finding]
[Not covered in Government's affidavits]	The burster and fuze are inserted after the bomb body is filled with gel. The insertion of the burster and fuze is a simple mechanical operation which can be done by an enlisted man in the field and consists merely of screwing in the bursting tube and snapping in the fuze. [Fdg. 9.]
It is undisputed that the shipments involved contained neither the burster nor the fuze and that they therefore did not contain either the incendiary element, *i.e.*, the white phosphorous, or the explosive element, *i.e.*, the TNT (R. 5). The only bomb parts shipped, as already noted, were the steel cases filled with	All the above articles described by the symbols M76 and M47 A2, consisting of bomb bodies of the types specified, filled with PT1 or NP gel as stated, were packed and shipped without the fuzes, bursters or other mechanisms used to open the bomb bodies and scatter and ignite the contents. [Fdg. 3(c).]

Government's Brief

gasoline which had been thickened by the addition of aluminum soap powders for the purpose of retarding the gasoline's free-flowing qualities (R. 8-9, 12, 76). [U. S. Br. 6.]

These steel bomb cases filled only with Napalm gel were similar to a "steel container filled with gasoline, with the exception that the Napalm gel filling does not flow as readily as gasoline and if ignited does not burn as rapidly as gasoline" (R. 76). Indeed, a "bomb body filled with Napalm Gel • • • presents considerabl[y] less hazard in transit, from a transportation viewpoint, than a drum filled with gasoline because Napalm Gel will not and can not leak from its container because it is a solid substance. Neither will Napalm Gel burn as readily as gasoline" (R. 9, 77). [U. S. Br. 6.]

Union Pacific Findings

The above articles described by the symbols M47 A2 (NP) were steel bomb bodies of the type described in War Department Technical Manual TM 9-1980—"Bombs for Aircraft"—as follows:

> BOMB, incendiary, 100-lb., AN-M47A2, is loaded with a 40-pound charge of gelled gasoline IM or NP. The complete round weighs 69 pounds.

Such steel bomb bodies were filled with NP gel, which is described in War Department Field Manual FM 3-6—"Employment of Air Chemical Munitions"—as follows:

Symbol	Name	Description and Physiological Effects
NP	Incendiary Oil NP	Gel of Napalm in gasoline. Napalm is mixture of metallic soaps. Properties similar to IM. [Fdg. 3(b).]

[Properties of IM, Fdg. 3(a): Burns evenly and is rather easy to extinguish if attacked soon enough.]

Government's Brief

In light of these facts, the Bureau of Explosives, which polices the Interstate Commerce Commission's Regulations of "Explosives and Other Dangerous Articles" (49 C.F.R., Parts 71-78, published originally as *Topping's Freight Tariff No. 4* and later as *Campbell's Freight Tar-off No. 8*), has consistently ruled that a Napalm-filled bomb case, shipped, as here, without fuze or burster, is "not a dangerous article" subject to the Regulations and hence is "not required to be shipped in accordance with the • • • regulations" (R. 20, 21). [U. S. Br. 6.]

Union Pacific Findings

The Bureau of Explosives is an agency of the railroads which enforces regulations of the Interstate Commerce Commission governing the transportation of explosives and other dangerous articles. As part of its duties, the Bureau publishes such regulations in the form of a tariff, which does not purport to classify any articles or commodities for the purpose of assessing charges for their transportation, but merely sets forth the rules which have been approved by the Interstate Commerce Commission for the packing, marking, loading, and handling of certain explosives and other dangerous articles. The regulations in effect in 1945 were published as Agent W. S. Topping's Freight Tariff No. 4, which in Section 59 provided as follows:

> 59 AMMUNITION, CHEMICAL, EXPLOSIVE
>
> • • •
>
> (b) When these articles [chemical ammunition used in warfare] are shipped assembled with their ignition elements, bursting charges, detonating fuzes, or explosive components they must be shipped in conformity with the regulations prescribed for explosive articles, class A, see sec. 57. For shipment of these

articles not containing ignition elements, bursting charges, detonating fuzes, or other explosive components, see secs. 330, 342, and 364. * * *

Section 330 * * * related to the shipment of bombs and shells containing poisonous gases or liquids * * *. Section 364 * * * related to the shipment of tear gases. Section 342 of the tariff pertained to the transportation of less dangerous poisons, * * * [and] read as follows:

PACKING

(a) Chemical ammunition consisting of projectiles, shells, bombs, grenades and other containers filled with gases, liquids, or chemicals, class B, without ignition elements, bursting charges, detonating fuzes, or other explosive components, must be packed for shipment in strong outside wooden or metal boxes. Boxes must be marked with name of contents and labeled as prescribed by these regulations for gases, liquids, or chemicals contained therein.

(b) Chemical ammunition, when shipped as such, must not be equipped or packed with explosive or ignition elements. (See Secs. 55 and 57 for explosive chemical ammunition.) ([Fdg. 12.]

In view of the circumstance that the Government in this case admitted that the articles here in question were identical with those shipped in the *Union Pacific* incendiary bomb case (R. 5, Item 2; R. 43, 44, Item 3; R. 56, 63, Item 3), it is thus perfectly clear that the Government's affidavits not only raised no issue of fact, but adduced no new matter that was legally relevant in the present proceedings.[18]

Everything else relied on by the Government (U.S. Br. 28-30) involved expressions of opinion as to the meaning of "incendiary", essentially to the effect that napalm gel should not be deemed incendiary because it is not self-igniting. But this presents nothing new; the Court of Claims, which found that this substance is not self-igniting although highly inflammable (Fdg. 10, 125 C. Cls. at 401), held that it was incendiary none the less (*id.* at 392).

Accordingly, this is not, as the Government supposes (U.S. Br. 30), a difference "as to the nature and characteristics of Napalm gel", but simply an issue of law, of interpretation of the word "incendiary" as used in the tariff, a "dispute * * * merely whether words in the tariff were used in their ordinary meaning, or in a peculiar meaning." *Great Northern Ry.* v. *Merchants Elev. Co.*, 259 U.S. 285, 293. Such a dispute raises no question of fact, and accordingly, even if the question were open—which, as we have shown *supra* pp. 47-49, it was not—the result could only be that the case was a proper one for summary judgment, and that no purpose would have been served by the further hearing that was suggested by the dissenting judges below (R. 86).

The facts are neither disputed nor fairly disputable. To those facts, the Court of Claims, as we shall now show, correctly applied well settled doctrines of classification.

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[18] As has been seen, *supra* p. 54, the only point in the Government's affidavits that was not fully covered in the *Union Pacific* case was the relative value of the bombs with and without fuzes. But that would go only to the reasonableness of the rate.

D. Application of well-settled rules of rate classification requires the holding, made below, that the articles in question were properly rated as incendiary bombs.

Under this heading we show, first, that the absence of essential parts not affecting the identity of an article does not change its character from a tariff standpoint; next, that neither the rule for combination articles nor the rule of analogy is applicable, though the one last-named would support the holding below; and, finally, that whether or not the articles in question were to be regarded as dangerous within the meaning of the regulations as to transportation of explosives has no bearing on their classification for rate purposes.

(i) *The absence of essential parts not affecting the identity of an article offered for transportation does not destroy its fundamental character from a tariff standpoint.*

In the *Union Pacific* case, the Court of Claims found and the Government, far from questioning that finding, presses that point vigorously (U. S. Br. 28-30)—that (Finding 10, 125 C. Cls. at 401; quoted *supra*, p. 6):

> "Although the PT1, NP, and IM gasoline-thickened gels are highly inflammable, they are not self-igniting. A bomb body filled with the gel, but without the burster and fuze, would not function as an incendiary bomb."

The foregoing must be read in conjunction with Finding 14 in the same case (125 C. Cls. at 404; quoted *supra*, p. 9), to the effect that—

> "The M47 and M76 bomb bodies when filled with gels, but without the bursters and fuzes, have no purpose or use except as incendiary bombs."

This portion of Finding 14, likewise, is not questioned by the Government.

Even with the burster and fuze, it should be noted, an incendiary bomb will not function so long as the arming wire with which such bombs are equipped is in place, and if one were dropped equipped with burster and fuze and with the arming wire in place, it still would not function. Moreover, even a complete bomb fully armed, and intended to explode when dropped, might fail to explode or ignite. Consequently, whether an article offered for transportation is immediately capable of functioning for the purpose for which it is made is not necessarily controlling in ascertaining its classification and rating for transportation purposes.

For it is a well established rule in the construction and application of railroad tariffs that the absence of essential parts not affecting the identity of an article offered for transportation does not destroy its fundamental character from a transportation or tariff standpoint.

Thus, in *Lakewood Engineering Co.* v. *New York Cent. R. Co.*, 259 Fed. 61 (C. A 6), the carrier had recovered a judgment for undercharges. The articles shipped were sections of railway track, made of two parallel steel rails, with steel cross ties riveted at each end, but without the plates and bolts necessary to fasten the rails of adjoining sections to each other. Those plates and bolts were packed and shipped separately.

The carrier claimed charges based on an item in the freight classification, "Tracks, portable railway, set up in sections," which was rated in the 5th class. The shipper relied on another item in the published tariff that quoted a lower rate on "New iron and steel rails and iron and steel cross ties." The Circuit Court of Appeals held that the articles shipped were properly classified as "portable railway track set up in sections," and accordingly affirmed the judgment in the carrier's favor. It said (259 Fed. at 62-63):

"We see no room to doubt that the article shipped was 'portable railway track, set up in sections.' * * * While the plates and bolts may be an essential part of a 'ready to sell' section of a portable track, they are plainly but a mere incident or appurtenance to the substantial thing itself. For purposes of definition and classification, a steam engine does not cease to be such because the governor is omitted, nor would shoes be anything but shoes, if shipped without buttons or laces. These sections might have been provided with bolts and plates, but one tie might have been left off, whereby the sections would not have been satisfactory for contract delivery until the missing tie had been supplied, but we think they would still be 'sections of portable railway track'; and the same thought covers the deficiency which here existed."

The result there reached by the Sixth Circuit was also arrived at by the Interstate Commerce Commission in a later case between the same parties involving the same articles. *Lakewood Engineering Co.* v. *Director General,* 57 I.C.C. 311. And the principle of the *Lakewood Engineering* cases has been consistently applied by the Commission in other situations.

Thus, in *Harris Bros. Co.* v. *Director General,* 60 I.C.C. 428, the controversy involved the proper classification of carload shipments from New York to Bellwood, Pa., of second-hand locomotives that were partially dismantled. The carrier charged 4th class rates under the following item of the freight classification:

"Locomotives, Locomotive Tenders, Locomotives and Tender combined, and Locomotives and Cars combined Compressed Air, Electric, Gasoline or Steam:

* * * *

"K.D. (machinery parts boxed) C.L. 4th class."

The complainant contended (60 I.C.C. at 429) "that as many of the more valuable parts were shipped separately, and others were missing, the remaining parts comprising these shipments should have been classified as individually set forth in the classification, in which most of them were accorded fifth class."

The sole question at the hearing was whether the shipments were within the terms of the classification item quoted above. The Commission held that they were, saying (60 I.C.C. at 429-430):

> "The locomotives had been out of use for about seven years, during which time they had been stored in the open unprotected from the elements. From many various detachable parts had been taken and other parts were found useless or broken and discarded. For example, only six of the locomotives had headlights, and various injectors, drive wheels, and pipes, as well as air-hose coupling were missing. * * *
>
> "The locomotives were purchased f.o.b. New York, but it seems to have been incumbent upon complainant to supervise their preparation for shipment. Practically all of the brass parts were shipped to Depew, N. Y. All of the air-brake equipment was segregated and shipped as a separate consignment to Bellwood. The remaining smaller parts were packed in boxes and shipped with the major parts, such as the boilers, frames and trucks to Bellwood. * * *
>
> "The absence of essential parts, not affecting the identity of an article transported does not destroy its fundamental character from a transportation or tariff standpoint. *Lakewood Engineering Co.* v. *Director General,* 57 I.C.C. 311. * * *
>
> "We find that the shipments properly came within the classification description of Locomotives, k.d., and that the fourth class rates were applicable."

A similar question arose in *Diamond T Motor Co.* v. *Michigan Central R. Co.*, 200 I.C.C. 599, where the Commission held that the lack of tires and batteries on a motor chassis did not destroy its identity as such. The Commission said (200 I.C.C. at 599-600):

> "Complainant corporation alleges that the rate charged on a carload of motor-vehicle chassis parts * * * was applicable.
>
> "These parts, weighing 44,900 pounds, constituted seven complete chassis, except batteries and tires. The 4th class rate of 52 cents per 100 pounds was originally charged. Subsequently, defendants presented an undercharge bill based on the rule 25 rate of 75 cents applicable on knocked-down motor vehicle chassis and the provision of rule 20 of the classification, which reads:
>
> > " 'Parts or pieces, constituting a complete article, received as one shipment, on one bill of lading, will be charged at the rating provided for the complete article.'
>
> "The undercharges have not been paid. Complainant contends that rule 20 has no application as the articles shipped did not constitute complete chassis within the meaning of that rule. The lack of tires and batteries did not destroy the identity of the articles as chassis. Under similar circumstances it was found that the rate on the complete article applied. *Lakewood Engineering Co.* v. *Director General*, 57 I.C.C. 311."
>
> * * *
>
> "We find that the shipment consisted of knocked-down motor vehicle chassis, that the applicable rate thereon was 75 cents, and that undercharges are outstanding. The complaint will be dismissed."[19]

[19] This case illustrates how the Commission may find that *undercharges* are outstanding but dismiss the complaint, because the

Under the principle of the foregoing rulings, it is plain that the Court of Claims was correct in holding that the absence of bursters and fuzes from the articles now in question did not affect their identity as incendiary bombs. For, as the court had found (*supra*, pp. 9, 59), without contest by the Government, those articles had no purpose or use other than as incendiary bombs.

(ii) *The rule for rating combination articles has no application here.*

Rule 18 of the freight classification (125 C. Cls. at 391, note 2) provides:

COMBINATION ARTICLES

> "When not specifically classified, articles which have been combined or attached to each other, will be charged at the rating for the highest classed article of the combination, and on shipments subject to CL rating the minimum weight will be the highest minimum weight provided for such highest rating."

In the audit and settlement of the transportation charges on the shipments now in question, the General Accounting Office ruled that the articles shipped should be classified and rated under Rule 18 as "combined or attached" articles composed of (a) bomb bodies, (b) gasoline, and (c) soap powder or other chemical thickening agent (R. 5-6. Item 3; R. 23, ¶ 3, admitted by ¶ 3, R. 51; R. 55, ¶ 6, admitted by ¶ 5, R. 69).

Since the Court of Claims held that the articles in question were "incendiary bombs" within the meaning of Item 1820, it went on to hold (125 C. Cls. at 393) that "we need not consider the contentions of the parties as to the appli-

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Commission has no jurisdiction or authority to order a shipper to make good an undercharge and must leave the carrier to its remedy of a suit against the shipper in the courts. See *J. G. Falls & Co.* v. *Chicago, R. I. & P. R. Co.*, 15 I.C.C. 269; *Heid Bros.* v. *El Paso and Northeastern R. Co.*, 55 I.C.C. 416.

cation of Rules 17 and 18, for these rules do not apply where there is a specific classification."

In so holding, the Court of Claims was clearly correct, for two reasons.

First, Rule 18 by its terms does not apply to articles specifically classified.

Second, Rule 18 does not apply to combinations of articles joined or attached to each other unless the separate parts are so joined together are suitable or adaptable to separate uses. As the Commission said in *Stewart & Stevenson Services, Inc.* v. *Baltimore & O. R. Co.*, 276 I.C.C. 156, 157:

> "It has been held repeatedly that Rule 18 does not apply to articles that have the characteristic of an entity. * * * Its application is to combinations of articles that are suitable or adaptable to separate uses."

That case involved shipments of Diesel engines and propeller shafts, taken from U. S. naval vessels, and described in the bills of lading as "propulsion units." As shipped, the propeller shaft was attached to the engine, and each unit was crated. The rate charged by the carrier, $1.61 cwt, was that applicable to machinery or machines noibn (noibn=not otherwise indexed by name). The shipper contended that there were lower rates, of $1.43 cwt on Diesel engines and of $1.34 on propeller shafts, and that under Rule 18 he was required to pay the higher of those two rates, which was still lower than the rate charged. The Commission held that Rule 18 did not apply, and that the carrier's charge was accordingly correct.

The kind of articles to which Rule 18 would apply would be a combined ironing board and step ladder, a combined chair and step ladder, an air heater and lighting fixture combined, a telephone stand and chair combined with an electric lamp, a screw driver and a flash light combination,

a clock and electric sign. Unless and until a specific entry is put into the classification for the combination, Rule 18 would apply to such combinations.[20]

Very plainly, the articles here in question were not "combined or attached in the foregoing sense. The articles here in question are "articles that have the characteristic of an entity." *Stewart & Stevenson Services, Inc.* v. *Baltimore & O. R. Co.*, 276 I.C.C. 156, 157, *supra.* As Finding 14 in the *Union Pacific* case shows (125 C. Cls. at 404; *supra* p. 9), the articles here in question could not be separated into their component parts. The incendiary gel is a viscous sticky material, hard to manipulate even in the laboratory, and cannot be removed from the bomb bodies once it is put in them without extreme difficulty, nor can the gels be separated into gasoline and the original thickening agents at all. There is no known method for doing so. And the articles in question were made for use as incendiary bombs and had no other purpose or use.

(iii) *The rule of analogy is inapplicable, but would in any event support the classification made by the court below.*

Classification Rule 17 (125 C. Cls. at 392, note 3) provides as follows:

CLASSIFICATION BY ANALOGY

> "When articles not specifically provided for, nor embraced in the classification as articles "noibn," are offered for transportation, carriers will apply the classification provided for articles which, in their judgment, are analogous; in such cases agents must report facts to proper officer of Freight Department in order that rating applied may be verified and necessary classification provided. This rule will not apply in connection with ratings or rates published in Exceptions to the Classification or in commodity tariffs."

[20] The foregoing examples are taken from the testimony given at Tr. 24-25 of the *Union Pacific* case by L. W. North, a member of the Official Classification Committee.

Rule 17 is a rule used only in the absence of a specific rating or an applicable noibn rating, for articles which have been overlooked in the compiling of the freight classification or are new or for one reason or another cannot be placed under any specific entry or any general noibn entry. Obviously, occasions for the use of Rule 17 are not frequent, because the purpose of the freight classification is to publish ratings on all articles and commodities offered or likely to be offered for transportation, and it is an exceptional case when no applicable rating can be found and resort must be had to Rule 17.

In 1944 and thereafter, when these shipments moved, an incendiary bomb was not a new article or one whose transportation characteristics were not known. In War Department Supply Bulletin 55-6 entitled Freight Billing Guide—Application of Consolidated Freight Classification to Chemical Warfare Service Items, incendiary bombs of the M76 and M47 types were listed with the direction that they be described on bills of lading as incendiary bombs, with reference to Item 1820 of the Consolidated Freight Tariff. See finding 13 in the *Union Pacific* case, 125 C. Cls. at 404, which was as follows:

> "13. During the time of the shipments referred to herein, the War Department had in effect a supply bulletin, No. SB 55-6, which was described as a Freight Billing Guide for the application of the Consolidated Freight Classification to Chemical Warfare Service items. The first page of the bulletin contained the following statement:
>
> This freight billing guide was compiled for the use of Transportation officers and their organizations. The bill of lading descriptions shown herein are to be used in preparing and issuing bills of lading in accordance with paragraph 14*o* (2), AR 55-150, in order to facilitate settlement of transportation charges.

> "The bulletin listed bombs of the M76 and M47 types under the heading 'Bomb, Incendiary' and included a direction that such bombs should be described on bills of lading as 'incendiary bombs' with reference to Consolidated Freight Classification No. 16, Item 1820."

A specific description and rating not only excludes the application of the general rules such as Rules 17 and 18, but also prevails over other more general descriptions which might otherwise be broad enough to cover the articles shipped. *United States* v. *Gulf Ref. Co.*, 268 U.S. 542, 546; *Atchison, T. & S. Fe Ry. Co.* v. *United States*, 74 C. Cls. 154, 156-157.

But even on the assumption, here made for the purposes of argument, that analogies were properly to be considered, the articles in question were still *incendiary bomb bodies* filled with *incendiary gels.* Such articles are far more closely analogous to the "Incendiary * * * Bombs" of Item 1820 of the freight classification than they are to gasoline noibn, or sand-filled dummy bombs, or solidified alcohol in metal cans, or dummy bombs, sand-loaded or solid.

The only difference in transportation characteristics between (a) an incendiary bomb filled with incendiary gel without bursters and fuzes and (b) an incendiary bomb filled with incendiary gel with bursters and fuzes is that the former is a somewhat less hazardous article. Other transportation characteristics such as bulk, weight, density, volume, packing, fragility, services rendered, would be the same; and of course the degree of hazard is a matter of the reasonableness of the rate and not of classification.

It is significant that Item 1820 is the only entry in the freight classification for "Incendiary * * * Bombs." If Item 1820 were not applicable to the articles in question it might be difficult to say to what it would be applicable. Item 1820 is indented under the heading

AMMUNITION, Explosive, Incendiary or Gas Smoke or Tear Producing:

There is another heading, immediately following in the freight Classification, which is:

AMMUNITION, Not Explosive, Incendiary, Gas, Smoke, or Tear Producing:

under which there are entries for bomb bodies, dummy bombs, sand loaded bombs etc.

The articles in question were not empty bomb bodies or dummy bombs or sand-loaded bombs, or cans of solidified alcohol. They were live bombs ready for use in aircraft, lacking only the bursters and fuzes which, so Finding 9 in the *Union Pacific* case (125 C. Cls. at 401; *supra*, p. 6) shows, "is a simple mechanical operation which can be done by an enlisted man in the field and consists merely of screwing in the bursting tube and snapping in the fuze."

If the rule of analogy applies at all, then, as *Erie Railroad Co.* v. *United States*, 79 C. Cls. 102, demonstates, it supports the result reached below. There the articles shipped were described as "bomb sights and bomb release mechanisms." The Government contended that they should be classified as "Ordnance stores" which were rated second class. The plaintiff claimed the rates applicable to "Scientific instruments" under Rule 17. The court held that the articles shipped were more nearly analogous to scientific instruments than to ordnance stores, and therefore that they should be classified and rated as scientific instruments as claimed by the plaintiff. The court said (79 C. Cls. at 107, 109):

"What may or may not fall within the generic designation 'scientific instruments' is manifestly a question to be determined by the instrument itself, and not by the official or departmental classification of the article

for the purposes of issue to the officers of the Army or Navy during its use. An article is not necessarily classified as ordnance stores for the purpose of ascertaining the freight charges for its transportation because the department of the Government having jurisdiction over its custody and issue for use so treats it.

* * * * * *

"The defendant likens the articles to ordnance stores; the plaintiff, to scientific instruments. We think the analogy is much nearer and more definite to scientific instruments than to ordnance stores, as to which latter term the record leaves us greatly in doubt."

Consequently, if in the present case the rule of analogy merits consideration at all, it would require the application of Item 1820 to the articles here in question as the rating which is the most nearly descriptive and applicable.

(iv) *The applicability or otherwise of the regulations for explosives and other dangerous articles has no bearing whatever on the classification of any articles for rate purposes.*

The Government argues at length (U.S. Br. 32-35) that since the articles in this case, incendiary bombs without bursters or fuzes, are not considered dangerous within the meaning of the Interstate Commerce Commission's regulations governing the transportation of explosives and other dangerous articles, it follows that they were improperly classified as incendiary bombs under Item 1820 of the Consolidated Freight Classification.

This conclusion does not follow for a number of reasons, duly set forth below, of which the controlling one is that, as this Court has held, the applicability or otherwise of the regulations as to explosives, etc., is completely irrelevant to questions of the proper rate to be charged for any of the multifarious commodities covered in those regulations.

1. The regulations in question, now contained in 49 CFR, Parts 71-78, are prescribed by the Interstate Commerce Commission pursuant to 18 U.S.C. § 835. Thereafter, as a matter of convenience to shippers and carriers these regulations are republished in the form of a tariff. See *Union Pacific* Fdg. 12, quoted *supra* pp. 6-7.

In either form, the applicability of those regulations, howsoever they may be brought to the attention of those concerned, is utterly irrelevant to any issue of freight rates or tariff classification. See *United States* v. *Gulf Ref. Co.*, 268 U.S. 542, 550, where this Court said:

> "The regulations of the Interstate Commerce Commission [for the Transportation of Explosives and Other Dangerous Articles], revised July 15, 1918, required liquid condensates from natural gas or from casinghead gas of oil wells, alone or blended with other petroleum products, having a vapor pressure of not more than ten pounds per square inch, to be shipped as 'gasoline, casinghead gasoline, or casinghead naphtha. Unrefined naphtha was not mentioned. The description of the shipments as gasoline under these regulations had no tendency to show that the tariff rate on unrefined naphtha was not applicable. The purpose of the regulations was to require a disclosure of the character of the shipment, having regard not to rates but to the dangers to be guarded against. It was not an admission on the part of the defendant that the gasoline rate was applicable or that the shipments were not unrefined naphtha within the meaning of the tariff. * * *"

In other words, the regulations as to explosives, etc., have nothing to do with rates. Here again, the Government's argument overlooks a controlling decision of this Court.

2. Even so, the Government's argument in this case badly misreads the regulation as embodied in the tariff..

The Government relies on the notation in the tariff, "subject to Rule 39"—the regulations in question—and argues (U.S. Br. 32-33) that unless the article is subject to those regulations it is not properly classified under Item 1800 or any of its subdivisions.

But "subject to Rule 39" is simply a cross-reference; it does not embody a command. And Section 342(a) of the tariff (see Fdg. 12, 125 C. Cls. at 403-404, *supra* p. 8, 49 C.F.R. [1949 ed.] § 73.342) specifically covers these articles, viz., "chemical ammunition consisting of * * * bombs * * * filled with * * * chemicals * * * without ignition elements, bursting charges, detonating fuzes, or other explosive components * * *." That provision prescribes how such articles must be packed and how they must be marked. To that extent the articles here in question *are* subject to Rule 39, by its very terms. Rule 39 is too comprehensive, covering a multitude of goods, from those that are extra-hazardous to those only slightly so, and covering a host of subjects as well, to supply a pat answer for every situation simply by mere citation. One might well seek to determine the legal questions involved in the present case by noting on the opinion under review, "subject to Title 49 U.S.C."

3. Throughout its argument, the Government urges (U.S. Br. 33-35) that the incendiary bombs less bursters and fuzes are not hazardous. This of course, is a contention going to reasonableness, an issue not open to either party in the present judicial proceeding. Even so, it may be pertinent to call attention to the rule that hazard is only one out of many factors that must be considered by the Commission in determining whether a rate or classification is just and reasonable.

In *Class Rate Investigation, 1939,* 262 I.C.C. 447, the Commission said (pp. 508-509):

> "The primary purpose of a freight classification is to assign each article, or a group of articles, to a class

according to well-known classification principles or elements which recognize distinctions from a transportation standpoint, along fairly broad lines, in order to meet the needs of commerce. None of the principles or elements should be controlling, but all that are relevant should be considered. Among them are: Weight per cubic foot and value per pound as packed for shipment; liability to loss, damage, waste, or theft in transit; likelihood of injury to other freight with which it may come in contact; risks due to hazards of carriage; kind of container or package as bearing upon the matter of liability or risk; expense of, and care in, handling; ratings on analogous articles; fair relation of ratings as between all articles; competition between articles of different description but largely used for similar purposes; commercial conditions and units of sales; trade conditions; value of service; volume of movement for the entire country in either less than carloads or carloads; adaptability to movement in carloads; and carload minimum weights just to carriers and shippers."

See also *War Materials Reparation Cases,* 294 I.C.C. 5, 144, quoted *supra,* p. 46.

Plainly enough, to concentrate entirely on the element of hazard to the exclusion of every other element—as the Government does—results in a grossly distorting oversimplification of a highly complex matter.

4. In its effort to minimize the essentially deadly character of the articles now in question, the Government makes statements that are so misleading as to be tantamount to misrepresentation. It says (U.S. Br. 34, n. 23): "Note, also, the Court of Claims' opinion holding that Napalm must be classified as 'soap powder' for freight-rate purposes. *Union Pacific Railroad Co.* v. *United States,* 117 C. Cls. 757."

The plain inference of the foregoing is that the bomb bodies here in question contained an inherently harmless and inert substance.

What the Government does not disclose, however, is that the case cited dealt, not with Napalm gel, i.e., jellied gasoline, such as is involved here, but with the Napalm itself less the gasoline, i.e., the granulated soap that is the thickening agent! And the issue before the Court of Claims in 117 C. Cls. 757 was simply whether the Napalm aluminum soap, which is not soluable in water and which is therefore wholly different from household soap and so does not qualify as "soap" in common parlance, should be classified for freight rate purposes as "soap powder" or as "chemicals noibn".

That case, accordingly, had nothing whatever to do with the inflammable Napalm gel mixture involved here, which is the vital element of the fearsome instrumentality of war that has reduced so many enemy cities to cinders.

But, by speaking of "Napalm gel" in one breath, and of "Napalm" alone in another, the Government has managed to confuse the two in a manner that, at the very least, is patently misleading.

We regret to have to point out that the same intermingling of Napalm, the thickener, and Napalm gel, the thickened gasoline, appears also at two other points in the Government's brief; we have italicized, in the passages set forth in the margin, the double meaning in which the Government has used the word "Napalm", first in one sense and then in the other.[21]

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[21] U.S. Br. 37, n. 26: " • • • the Army could have given consideration to breaking the shipments into their component parts by shipping the steel cases and *Napalm gel* separately, thus obtaining the benefit of the low fifth-class rates concededly applicable to each of the component parts. A similar shipping procedure is now utilized by the Army. The record shows that the Chemical Corps has regularly shipped '*napalm thickener* • • • separate and apart

Having exposed these misleading references to two distinct substances that are wholly different in their qualities, respondents refrain from further comment.[22]

It follows, necessarily, that the Court of Claims was correct in holding that incendiary bombs less bursters and fuzes were properly classified under Item 1820 as incendiary bombs.

V. RESPONDENTS BANGOR AND AROOSTOOK AND SEABOARD AIR LINE ARE NOT ESTOPPED SINCE THE GOVERNMENT CAN SHOW NEITHER RELIANCE, CHANGE OF POSITION, NOR PREJUDICE; AND THE UNDISPUTED FACTS WHOLLY NEGATIVE ACQUIESCENCE

The Government argues (W.S. Br. 35-41) that respondents *Bangor and Aroostook* and *Seaboard Air Line* are estopped to claim the higher rates awarded by the judgment below, relying on the following facts (U.S. Br. 8-9, 36; R. 80-82):

In November 1943, before the shipments in question were made, the Official Classification Committee, as agent of

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from the bomb body' of fire bombs (gasoline-tank type) (R. 72)." [Italics added.]

U.S. Br. 42, n. 30: "To the contrary, since a steel bomb body is rated fifth class and since *Napalm* itself, as the Court of Claims has ruled, is ratable fifth class, the Government's consistent position in all of these cases has been that the entire or combined shipment, consisting of the bomb body filled with *Napalm*, should also be rated fifth class and not first class under Item 1820. See *Union Pacific Railroad Co.* v. *United States*, 117 C. Cls. 757." [Italics added.]

[22] The Government also says (U.S. Br. 31, n. 19), "Should the cases be remanded to the Court of Claims, we are prepared to show that bomb cases with Napalm gel are not in fact ammunition." In view of the undisputed finding in the *Union Pacific* incendiary bomb case (Fdg. 14, 125 C. Cls. at 404) that "The M47 and M76 bomb bodies when filled with gels, but without the bursters and fuzes, have no purpose or use except as incendiary bombs", it is almost matter for regret that, for the reasons set forth *supra*, pp. 51-58, there will be no occasion for a remand and thus no opportunity to test the Government's attempt to demonstrate the whiteness of black.

the railroads, issued an informal ruling at the Army's request to the effect that since the incendiary bombs less bursters and fuzes "were not dangerous", they should be rated by analogy as "Empty Aerial Bombs" under item 1895. This ruling was in effect when the 1944 shipments were made, and was confirmed by the Committee in May 1945.

The Court of Claims rejected the proffered defense, saying (R. 85)—and on this point there was no dissent—

> "This ruling was subsequently rescinded and admitted to be a mistake by the Committee and also by the defendant in the *Union Pacific Railroad* case, *supra.* We do not see how the defendant could reasonably have been misled or injured by the ruling, especially when the plaintiffs promptly billed the defendant at the first-class rate and the defendant paid that rate and continued to make the shipments at the rate. Moreover, the only cases cited by the defendant on the availability of the defense of estoppel to the Government in these railroad cases are *Oregon-Washington Railroad & Navigation Company* v. *United States,* 255 U.S. 339 and *Western Pacific Railroad Company* v. *United States,* 255 U.S. 349. Both of these cases involved the acceptance by the railroad of shipments at the lower rate and gross acquiescence in the shipments at that rate. The Supreme Court held that the railroads were precluded from recovering the higher rate because of their gross acquiescence. There is no acquiescence in these cases. The railroad billed and was paid the higher rate and suit was commenced shortly after the Government set off the sums here in suit against money otherwise due the plaintiffs. See *St. Louis Brownsville & Mexico Railway Company* v. *United States,* 268 U.S. 169."

That ruling was plainly right, for a number of reasons:

1. The factual basis for the Court of Claims' determination was the testimony on file in the earlier *Union Pacific*

incendiary bomb case, 125 C. Cls. 390.[23] In that case, Mr. L. W. North, a member of the Official Classification Committee, had testified as follows (Tr. 32-33, 42; No. 49505, C. Cls.):

By Mr. Cake [Counsel for Union Pacific]:

22Q. Was your committee at one time asked for a ruling on a metal tube or container filled with gasoline and Napalm?

A. Yes, sir, we had a telephone inquiry for such a ruling.

23Q. When was that?

A. That was in 1943, I believe November.

24Q. Go ahead.

A. And a member of the Classification Committee ruled that such an article was rateable by analogy as an empty bomb.

25Q. Do you agree with that ruling?

A. No, sir, I do not.

26Q. Did that committee subsequently rescind that ruling?

A. Yes, the committee subsequently rescinded the ruling and the member of the committee that made the ruling admitted he had made a mistake and he corrected his mistake.

By Mr. Mehlinger [Counsel for the United States]:

27Q. Who was that committee member, please?

A. Mr. W. S. Flint.

By Mr. Cake:

28Q. Did the other classification committees concur in your final action?

[23] Material in a court's own files is plainly within the realm of judicial notice (e.g., *United States* v. *Pink*, 315 U.S. 203, 216; *National F. Ins. Co.* v. *Thompson*, 281 U.S. 331), and of course anything noticed below may be noticed in this Court on review. Cf. *Hanley* v. *Donoghue*, 116 U.S. 1.

A. Yes, all three classification committees considered the classification properly applicable on these bombs and concluded that they were incendiary bombs rateable under Item 1820 of the classification.

29Q. In your opinion, can these bombs filled with incendiary mixture be rated by analogy as empty aerial bombs?

A. No, sir, not in my opinion, they just can't be. If the analogy rule is to be followed at all, I would say that they are more analogous to an incendiary bomb than they are to an empty bomb, being filled with an incendiary mixture.

• • • •

By Mr. Mehlinger:

69XQ. I show you classification 16 that is involved.

A. I would be inclined to say that it is analogous to an incendiary bomb.

70XQ. Analogous to an incendiary bomb?

A. Certainly it is more analogous to that than it is to an empty bomb body.

71XQ. We are admitting on the record that we are not considering it an empty bomb. Is it your answer, then, that it would come under Rule 17 by analogy as an incendiary bomb?

A. As an incendiary bomb.

And Mr. C. G. Jensen, then Director of the Bureau of Traffic, Interstate Commerce Commission, testified (Tr. 48, same case):

By Mr. Cake:

16Q. In your opinion, could the articles in question which I have described be rated as empty aerial bombs?

Mr. Mehlinger: We stipulated that out of the case. That is not in issue, Mr. Commissioner. It is not in issue at all.

Mr. Cake: You can make a short answer.

A. No, they are filled. They are not empty.

2. But, apart from the foregoing, which showed that there was no issue of fact to be tried, it is plain that, even on the showing made in its brief, the Government cannot establish an estoppel, for the reason that it can show neither reliance, change of position, nor prejudice.

As this Court has said, "Estoppel in equity must rest on substantial grounds of prejudice or change of position * * *." *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 323. Other cases are to the same effect; to constitute an estoppel, someone must have been misled (*Ketchum* v. *Dunn*, 96 U.S. 659, 667-668), there must have been reliance (*Wiser* v. *Lawler*, 189 U.S. 260, 270), there must have been a change of position (*Jones* v. *United States*, 96 U.S. 24, 29).

There was nothing of that nature here, and the Government's assertions of reliance are pointedly barren of record references,[24] for the very excellent reason that none are available. Any suggestion of reliance rests wholly on imagination; there is no showing whatever in the record that any of the shipments in question were made in reliance on the Classification Committee's ruling.[25]

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[24] U.S. Br. 9: "Relying on this ruling, issued by the railroads' own Committee, the Government contended that respondents Bangor and Seaboard were estopped from claiming that the higher rates of Item 1820 applied to the 1944 shipments." This is ambiguous, and may mean only that the Government relied on the ruling in order to contend that there was an estoppel.

At U.S. Br. 37, where the "elements of a classic estoppel" are set forth, item (3) is stated as "numerous shipments by the Army over respondents' lines during 1944, while the ruling was in full effect"—with no indication that the shipments were made in reliance on the ruling.

Item (4) is said to be "detriment to the Army, because it could have used other shipping procedures or other means of transportation had it not been led to believe that the rail shipments would move at the lower rate available under Item 1895, rather than the high first-class rate of Item 1820." No record references are given.

[25] The Government's further speculation, again totally devoid of record support, that (U.S. Br. 37, n. 26) "had the Army been

Since, therefore, a basic element of estoppel is lacking on this record, it is not necessary to inquire whether the scope of the Official Classification Committee's authority was sufficient to bind these respondents by making rulings as to rates, particularly by one which, on its face, was a palpable mistake—for by no species of analogy can a filled bomb case be said to resemble an empty one—nor to examine into the soundness or otherwise of the Government's contention (U.S. Br. 37-38) that Section 22 of the Interstate Commerce Act permits the Government to invoke the defense of estoppel though a private shipper may not.[26] It is sufficient for purposes of this case that the Government has utterly failed to show either that it relied on the ruling, or that it changed its position, or that it was in any way prejudiced thereby. That being so, there can be no estoppel on any basis.

Indeed, this record shows affirmatively that the Government paid the bills of both respondents at the higher rate, and then, some years later, made the deductions the correctness of which is now in issue (R. 43-44, Item 2; R. 56, 63, Item 2). To the extent, therefore, that there is proof of any reliance whatever on the part of the Government, its reliance was on the representation that the larger sum was due. Nor is there any showing that the Government's course of action in initially paying the bills

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so advised before 1944, it could have considered moving the Napalm-filled bomb bodies by motor carrier, rather than rail, so as to obtain a lower transportation rate," assumes that under the war conditions obtaining in 1944 there was available motor transportation of sufficient capacity to move incendiary bombs. That assumption blandly ignores both (a) the gasoline and rubber restrictions in force in 1944 and (b) the extent to which present day trucking facilities were simply not available in 1944, nor does it consider (c) whether at that time the safety regulations permitted articles of the character now in question to be shipped by truck.

[26] Compare Brandeis, J., for the Court, in *St. Louis B. & M. Ry.* v. *United States*, 268 U.S. 169, 173: "In respect to furnishing transportation, a railroad ordinarily bears to the Government the same relation that it does to a private person using its facilities."

rendered by these respondents prejudiced its present defenses in any way.

It is not at all hyperbole to say that, in the circumstances of this case, any talk of estoppel is literally preposterous.

4. Moreover, there was no acquiescence on the part of these two respondents. After they had billed the Government at the higher rates and were paid at such rates, the Comptroller General made deductions; and thereupon, within the period of limitations, each sued in the Court of Claims to recover the amount of those deductions (R. 43-44, Item 4; R. 56-63, Item 4). Bringing suit within the time allowed by law can hardly be construed as acquiescence in the Government's action. Indeed, the course of dealing could with far more justification be deemed to reflect acquiescence in fact in the higher rate on the part of the Government.

The proper explanation of the so-called estoppel cases relied on (U.S. Br. 38-40) by the Government (*Oregon-Wash. R. R. Co.* v. *United States,* 255 U.S. 339; *Western Pac. R. R. Co.* v. *United States,* 255 U.S. 349) is that they rest on acquiescence; see *St. Louis B. & M. Ry.* v. *United States,* 268 U.S. 169, where Mr. Justice Brandeis, speaking for a unanimous Court, said (268 U.S. at 174-175):

> "* * * The right to invoke the legal remedy may be lost by the claimant's failure to invoke it within the statutory period of limitations. But the substantive right to recover an amount confessedly due can be lost only through some act or omission on the part of the claimant which, under the rules of the common law as applied by this Court to claims against the Government, discharges the cause of action. Acquiescence by the claimant in the payment by the Government of a smaller amount than is due will ordinarily effect the discharge. Acquiescence can be established by showing conduct before the payment which might have led the

> Government to believe that the amount allowed was all that was claimed, or that such amount, if paid, would be received in full satisfaction of the claim. Acquiescence can also be established by showing conduct after the payment which might have led the Government to believe that the amount actually received was accepted in full satisfaction of the original claim. But to constitute acquiescence within the meaning of this rule, something more than acceptance of the smaller sum without protest must be shown. There must have been some conduct on the part of the creditor akin to abandonment or waiver, or from which an estoppel might arise. Every case in which this court has sustained the affirmative defense of acquiescence rests upon findings which include at least one of these additional features. * * *"

Bringing suit within the period of limitations very plainly does not amount to an abandonment of the claims without protest. The result is that these two respondents are not barred by any acquiescence on their part.

We cannot forbear to add that the defense of "estoppel" on this record is so plainly without foundation in either fact or law that it seems to us surprising that it should even have been made. Indeed, the circumstance that the Government felt impelled to rely upon such an argument simply serves to underscore the essential untenability of the balance of its case, untenability that, we submit, has been amply demonstrated throughout the present brief.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Claims should be affirmed.

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APPENDIX

Statutes Involved

1. Section 16(3) of the Interstate Commerce Act (49 U.S.C. § 16) reads as follows:

"§ 16. Orders of Commission and Enforcement Thereof

* * * * *

Limitation of Actions

"(3)(a) All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues and not after.

"(b) All complaints against carriers subject to this chapter for the recovery of damages not based on overcharges shall be filed with the commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph.

"(c) For recovery of overcharges action at law shall be begun or complaint filed with the commission against carriers subject to this chapter within two years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph, except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include six months for the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

"(d) If on or before expiration of the two-year period of limitation in subdivision (b) of this paragraph or of the two-year period of limitation in subdivision (c) of this paragraph a carrier subject to this chapter begins action under subdivision (a) of this paragraph for recovery of charges in respect of the same transportation service, or without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety

days from the time such action is begun or such charges are collected by the carrier.

"(e) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

"(f) A complaint for the enforcement of an order of the commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after.

"(g) The term 'overcharges' as used in this section shall be deemed to mean transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission.

"(h) The provisions of this paragraph shall extend to and embrace cases in which the cause of action accrued prior to June 7, 1924, as well as cases in which the cause of action accrues thereafter, except that actions at law begun or complaints filed with the commission against carriers subject to this chapter for the recovery of overcharges where the cause of action accrued on or after March 1, 1920, shall not be deemed to be barred under subdivision (c) of this paragraph if such actions shall have been begun or complaints filed prior to June 7, 1924, or within six months thereafter."

2. Section 322 of the Transportation Act of 1940 (49 U.S.C. § 66) reads as follows:

"§ 66. Government Traffic; Payment for Transportation; Deduction of Overpayments

Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the

amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier."

3. Section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 1004(d), provides as follows:

"ADJUDICATION

"SEC. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

* * * * * *

"(d) DECLARATORY ORDERS.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty."